86-1155 (1)

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

Supreme Court of the United States

October Term 1986

International Primate Protection League, People for the Ethical Treatment of Animals, Inc., et al., Petitioners

v.

Institute for Behavioral Research, Inc., National Institutes of Health, et al., Respondents

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Edward L. Genn
107 West Jefferson Street
Rockville, Maryland 20850
(301) 424-8400
or (202) 638-2027
Counsel of Record for
Petitioner

January 5, 1987

BEST AVAILABLE COPY

BEST AVAI

QUESTIONS PRESENTED FOR REVIEW

1. Whether, when a defendant seeks and obtains a removal of a cause to the federal district court from the state court selected by the plaintiffs, and the federal courts ultimately determine that the cause should be dismissed under federal law because the plaintiffs lack standing in the federal court, that court is compelled to remand the case to the state courts if there may be any potential relief under state statutes or law.

2. Whether it violates due process rights or it improperly restricts access to the federal courts, to deny plaintiffs standing in the federal courts on the ground that the directly affected parties were alleged volunteers in their specific contacts or connections with the subject matter,

LABLE COPY

even though they established a direct ongoing involvement with the specific subjects of the suit, both before and after litigation.

3. Whether, where facilities receive substantial federal funds and grants for alleged research and the funding is terminated for violation of federal standards (violations which are also alleged to involve state law), and where, although all research is ended, the federal government refuses to exercise its remedies, including rights of forfeiture (here, as to laboratory animals purchased with federal funds), on the erroneous ground it does not possess them, citizens who have direct contact with or claims concerning the subjects of the grants or research must be granted standing to assert appropriate remedies.

BEST AVAIL

4. Whether, where a federal district court appoints a magistrate to determine matters in a cause, and that magistrate recommends dismissal without a hearing, argument, or the allowance of discovery on factual matters, all of which the district court adopts and affirms without opinion or articulated reasons, the intent of statutory authority granted under the Federal Magistrate Act or the federal rules themselves, or the litigant's effective or meaningful right to a decision made by an Article III judge is impermissibly violated in fact or in appearance; or whether the Fourth Circuit's ruling below is in conflict with Ninth Circuit's standards which assert that such final dismissals arising from an adopted "review" of the magistrate's determinations may not be sustained on

ABLE COPY

the basis of "simple appellate review", but rather, the rulings of the Article III judge must be reasonably articulated to assure, in fact and appearance, a specific de novo determination by an Article III judge.

LISTING OF PARTIES

The individual plaintiffs and class noted in the original suit filed in the state court (the Circuit Court for Montgomery County, Maryland), consisted of the following:

- International Primate Protection League, with home offices in South Carolina
- Animal Law Enforcement Association, Montgomery County, Maryland
- People for Ethical Treatment of Animals, Inc., Kensington, Maryland
- Alex Hershaft, Bethesda, Maryland
- Pamela Chapman, Chevy Chase, Maryland

- Jo Shoesmith, Silver Spring, Maryland
- Virginia Bourquardez, Silver Spring, Maryland
- Peter W. Solem, Esquire, Bethesda, Maryland
- Bertha Solem, Bethesda, Maryland
- Sherryl R. Thomas, Takoma Park, Maryland, and for themselves and the class

The original defendants in the suit were:

- Institute for Behavioral Research, Inc., or its successors, Silver Spring, Maryland
- Richard W. Swain, Jr., Sergeant, Montgomery County Police, Montgomery County, Maryland

- James V. Stunkard, D.V.M., Bowie, Maryland
- National Institutes of Health and its Animal Laboratory; the Public Health Service; the Department of Health and Human Services, Bethesda, Maryland

By virtue of rulings and a stipulation of parties, Dr. Stunkard was dismissed as a defendant, and Sgt. Swain only a nominal party.

While they did not appear in any of the lower courts below, a large group of organizations filed for and received permission to appear as amici in the Fourth Circuit. They are approximately 66 in number. Amici granted specific leave to appear and filing an extensive brief and appended documents and appearing in the Fourth Circuit are:

- American College of Surgeons*/
- American Council on Education
- American Psychological Association
- American Society for Microbiology
- Association of American Medical Colleges
- Association of American Universities
- Federation of American Societies for Experimental Biology
- Federation of Behavioral, Psychological, and Cognitive Sciences
- National Association for Biomedical Research
- Society for Neuroscience

*/ All are care of counsel filing for them, hereafter noted.

- National Association of State Universities and Land Grant Colleges
- National Society for Computers in Psychology
- Psychonomics Society
- Academy of Clinical Laboratory Physicians and Scientists
- American Academy of Neurology
- American Academy of Orthopaedic Surgeons
- American Academy of Otolaryngology - Head and Neck
- American Association for Thoracic Surgery
- American Association for the Surgery of Trauma
- American Association of Anatomists
- American Association of Chairmen of Departments of Psychiatry

- American Association of Neurological Surgeons
- American College of Psychiatrists
- American Federation for Clinical Research
- American Medical Association
- American Neurological Association
- American Orthopaedic Association
- American Pediatric Society
- American Psychiatric Association
- American Society for Cell Biology
- American Society for Clinical Pharmacology and Therapeutics
- American Society of Hematology
- American Surgical Association
- Association for Academic Psychiatry

- Association for the Behavioral Sciences and Medical Education
- Association of Academic Surgery
- Association of Anatomy Chairmen
- Association of Chairmen of Departments of Physiology
- Association of Departments of Family Medicine
- Association of Medical School Departments of Biochemistry
- Association of Medical School Microbiology Chairmen
- Association of Medical School Pediatric Department Chairmen
- Association of Orthopaedic Chairmen
- Association of Pathology Chairmen, Inc.
- Association of Program Directors in Internal Medicine

- Association of University Anesthetists
- Association of University Professors of Neurology
- Association of University Professors of Ophthalmology
- Association of University Radiologists
- Biofeedback Society of America
- Departments of Otolaryngology
- Pavlovian Society
- Plastic Surgery Research Council
- Shock Society
- Society for Health and Human Values
- Society for Pediatric Research
- Society for Psychophysiological Research
- Society for Academic Anesthesia Chairmen, Inc.

- Society of Chairmen of Academic Radiology Departments
- Society of Critical Care Medicine
- Society of Radiology Research Associates
- Society of University Otolaryngologists
- Society of University Surgeons
- Surgical Infection Society
- University Association for Emergency Medicine

All filed through counsel, White, Fine and Verville, Washington, D. C.

TABLE OF CONTENTS

	Page
Questions Presented for Review . .	i
Listing of Parties	v
Table of Contents and Table of Authorities	xiv
Petition for a Writ of Certiorari	1
Opinions Below	2
Jurisdiction	6
Constitutional, Statutory and Rule Provisions Involved . .	7
Statement of the Case	8
Argument	53
Reasons for Allowance of the Writ	53
The Further Points Supporting Grant of the Writ . . .	54
Conclusion	65
Index to Appendix	
Published Opinion of United States Court of Appeals for the Fourth Circuit, International Primate Protection League, etc., et al. v. Institute for Behavioral Research, Inc., etc., et al., No. 86-1508, Filed and Decided September 4, 1986 . . .	Pet.App. 1

Magistrate's Report and Recommendation Dismissing Suit, Filed January 17, 1985 . . . Pet.App. 35

Order of United States District Court for the District of Maryland Affirming Magistrate's Report and Recommendation, Filed April 9, 1985 . Pet.App. 59

Fourth Circuit Court of Appeals Denial of Petition for Rehearing and Suggestion for Rehearing In Banc, Filed October 7, 1986 . . . . . Pet.App. 61

Order of United States District Court for the District of Maryland Denying Plaintiffs' Motion for Order Altering or Amending Judgment and for Order Reconsidering and Setting Order of Dismissal Aside, and for Other Relief, With Request for Hearing, Dated November 19, 1985 . . . . . Pet.App. 63

Bill of Complaint (portions, and without exhibits), filed in Circuit Court for Montgomery County, Maryland, Equity No. 77895, filed December 3, 1981 . . . . . Pet.App. 65

Plaintiffs' Answer to Petition for Removal . . . . . Pet.App. 105

September 24, 1985 Letter of Defendant Institute for Behavioral Research, to Dr. William Raub, National Institutes of Health . . . . . Pet.App. 107

United States Constitution, Article III(1) . . . . Pet.App. 110

United States Constitution, 5th Amendment . . . . Pet.App. 110

United States Constitution, 14th Amendment . . . . Pet.App. 111

45 C.F.R. § 74.113(a) . . Pet.App. 112

28 U.S.C. § 636 . . . . . Pet.App. 112

28 U.S.C. § 1441(c) . . . Pet.App. 113

28 U.S.C. § 1447 . . . . . Pet.App. 114

Article 27, Crimes and Punishments, Annotated Code of Maryland, 1982 Vol.

§ 63 . . . . . Pet.App. 115
§ 67 . . . . . Pet.App. 116
§ 68 . . . . . Pet.App. 121

Federal Rule of Civil Procedure, Rule 56, Summary Judgment . . . . . Pet.App. 121

Rules of U.S. District Court - Maryland, Rule 6 . . . Pet.App. 122

TABLE OF AUTHORITIES

Page

Cases

Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982) 61

Animal Lovers Volunteer Association, Inc. (A.L.V.A.) v. Weinberger, 765 F.2d 937 (9th Cir. 1985) 61

Animal Welfare Institute v. Kreps, 561 F.2d 1002 (D.C.Cir. 1977), cert. denied, 434 U.S. 1013, 96 S.Ct. 726 (1978) 18, 58 59

Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis, 701 F.2d 784 (9th Cir. 1983) 59, 60

Dickey v. Greene, 729 F.2d 957 (4th Cir. 1984) 61

International Primate Protection League, et al. v. Institute for Behavioral Research, et al., 799 F.2d 934 (4th Cir. 1986) 6

Naylor v. McGrath, 585 F.2d 557 (2nd Cir. 1978) 55

Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 100 (1985) 63, 64

Pacific Legal Foundation v. Goyan, 664 F.2d 1221 (4th Cir. 1981) 59, 60

Ring v. River Walk Manor, Inc., 596 F.Supp. 393, 396 (D.Md. 1984) 55

Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361 (1972) . . 57

State of West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981) . 61, 62

Swett v. Schenk, 792 F.2d 1447, 1450 (9th Cir. 1986) 55

Taub v. State of Maryland, 296 Md. 439, 463 A.2d 819 (1983) 49

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405 (1973) . . 58, 59

Constitutional Provisions

United States Constitution, Article III(1) 7

United States Constitution, 5th Amendment 7

United States Constitution, 14th Amendment 7

Statutes

7 U.S.C. § 2131 17

28 U.S.C. § 636 7

28 U.S.C. § 1254(1) 6

28 U.S.C. § 1441(c) 7

28 U.S.C. § 1447 7

Article 27, Crimes and Punishments, Annotated Code of Maryland, 1982 Vol.

§ 59 24
§ 63 7
§ 67 . . . . . 7, 24
§ 68 . . . . . 7, 24
55, 56

Rules

Federal Rule of Civil Procedure, Rule 56, Summary Judgment 7

Rules of U.S. District Court - Maryland, Rule 6 7

45 C.F.R. § 74.113(a) 62

Publications

Hearings Before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology of the U.S. House of Representatives, Ninety-Seventh Congress, First Session [No. 11], March 31, 1981 10

Hearings Before the Subcommittee on Science, Research and Technology of the Committee on Science and Technology, U.S. House of Representatives, Ninety-Seventh Congress, First Session, October 13, 14, 1981 [No. 68] 9

No. _____

Supreme Court of the United States

October Term 1986

International Primate Protection League, People for the Ethical Treatment of Animals, Inc., et al., Petitioners

v.

Institute for Behavioral Research, Inc., National Institutes of Health, et al., Respondents

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners, International Primate Protection League, People for Ethical Treatment of Animals, Animal Enforcement Association and their members, and the individual Petitioners, Hershaft and the other named

individuals, for themselves and the class, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit referred to hereafter.

OPINIONS BELOW

The printed Opinion of the United States Court of Appeals for the Fourth Circuit appears at 799 F.2d 934 (4th Cir. 1986). It was published without the full references to the 66 amici curiae who were granted leave by that Court to file a brief and other documents, evidently omitted in error by the publisher.

The Slip Opinion, which includes these extensive amici, appears in the Appendix to this Petition at Pet.App. 1-34.

Thereafter, a timely petition for rehearing was filed, which was denied on October 7, 1986, the order for which appears in the Appendix (Pet.App. 61-62).

The final judgment of the Fourth Circuit in favor of the federal and state defendants on standing grounds arose from a case originally filed almost five years earlier, specifically in December, 1981 in a state court (the Circuit Court for Montgomery County, Maryland). That suit followed the seizure of seventeen monkeys pursuant to a warrant obtained and effected by officers acting under state law at the Silver Spring, Maryland laboratory of the Institute of Behavioral Research, a private facility receiving federally funded research funds. The seizure of the primates, allegedly used in earlier

research, occurred after one of the principals in the plaintiffs' organization had observed and cared for the primates over an extended time before the seizure (on at least 40 occasions). The December 1981 suit was filed after certain Congressional hearings and after the federal grant and funding was suspended by the federal defendants (at the time of the 1981 suit), and then wholly terminated (in 1982, years before the first dismissal rulings in 1985).

Upon removal of the case to the federal court in Baltimore by petition of the federal defendants, the cause remained there for over three years until a reference of pending motions to dismiss to a federal magistrate, Magistrate Frederick Smalkin, who, without hearing or evidence, issued his Report and Recommendations on January

17, 1985, asserting that the motions to dismiss should be granted for lack of federal or alleged state standing. (He reviewed some of the state claims on pendent jurisdiction grounds.) That determination appears in the Appendix to this Petition at Pet.App. 35-58.

Following timely objections, the United States District Court (the Honorable John R. Hargrove) thereafter issued a one-page order filed on April 9, 1985, affirming and adopting the magistrate's report and recommendations (Pet.App. 59-60).

A timely motion for order altering or amending the judgment, or for reconsideration, was denied by the district court, without remand or hearing, by an order appearing at Pet.App. 63-64.

JURISDICTION

The opinion, judgment, and order of the United States Court of Appeals for the Fourth Circuit in this civil case was on somewhat different grounds than below. It is otherwise styled in the reports as International Primate Protection League, et al. v. Institute for Behavioral Research, et al., 799 F.2d 934 (4th Cir. 1986). Unlike the magistrate and the affirmed ruling by the district court, the Fourth Circuit expressly declined to consider the state claims, including state statutes, or taxpayer status (Part IV, Pet.App. 33-34).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), and otherwise.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Constitutional provisions are: Article III, Section 1; and the Fifth and Fourteenth Amendments of the Constitution of the United States, set forth at Pet.App. 110-113.

Further involved are the following federal and state statutes: 28 U.S.C. § 636 (Pet.App. 112); 28 U.S.C. § 1441(c) (Pet.App. 113); 28 U.S.C. § 1447 (Pet.App. 114).

Article 27, Crimes and Punishments, Annotated Code of Maryland: § 63 (Pet.App. 115); § 67 (Pet.App. 116); and § 68 (Pet.App. 121)

Rules are: F.R.C.P. Rule 56(c), Summary Judgment (Pet.App. 121); and Local Rules of U.S. District Court - Maryland, Rule 6(g) (Pet.App. 122).

STATEMENT OF THE CASE

The Fourth Circuit's full dismissal of this cause on motions to dismiss for alleged lack of standing under federal law, and the issues its decision presents, in removal and magistrate procedure and in areas of law related to standing, statutory funding and remedies for abuses, were deemed wide-ranging and important enough to allow the 66 amici who sought intervention to support the defendants, to do so.

The pertinent filings and events alleged before the litigation were also of sufficient significance to be the subject of specific Congressional hearings in the House of Representatives on subjects that explored the very events involved in this case, all of

which were noted below and took place on October 13 and 14, 1981. See Hearings Before the Subcommittee on Science, Research and Technology of the Committee on Science and Technology, U.S. House of Representatives, Ninety-Seventh Congress, First Session, October 13, 14, 1981 [No. 68], on the subject of "The Use of Animals in Medical Research and Testing (hereafter October 1981 hearings).

Those hearings were a follow-up of what began earlier that year on March 31, 1981 and April 1, 1981 on the subject of "Fraud in Biomedical Research", which noted, through its chair, then-Congressman Gore, that as of that time ". . . [i]n 1981, the Federal Government will spend over $35 billion in research and development . . ."; and that over ten percent, or ". . . $3.5 billion is spent by the National Institutes of

Health for the support of biomedical research . . ." which the Congress was examining into in order to address fraud, abuses of grants, commercialization of research, and whether there were adequate correctives and monitoring procedures. See Hearings Before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology of the U.S. House of Representatives, Ninety-Seventh Congress, First Session [No. 11], March 31, 1981, pp. 1-2.

This case not only began after those hearings, at one of which a principal in this case, Mr. Pacheco, testified about his earlier contacts with the primates and what occurred then; it also began well after seizure of the primates at Behavioral's laboratory and suspension of the research

grant. Specifically, it started with a filing of a suit in the Circuit Court for Montgomery County, Maryland, on December 3, 1981, brought by the plaintiffs-appellants against the defendant-appellees and then known as Equity Number 77895. Because it seems so evidently critical to the issues, a copy of certain significant portions of that Bill of Complaint (with its extended exhibits and its motions for injunctive relief omitted) appears in the Appendix to this Petition at Pet.App. 66-104.

The suit, which was served on the federal defendants on December 7, 1981, was followed by their Petition for Removal, submitted eleven days later, on December 17, 1981, in the United States District Court of Maryland, (R.1-R.8), incorporating the plaintiffs' individual

and class-action Circuit Court suit with its exhibits, motions and show cause order (and providing the jurisdictional basis for such removal).

The parties to the original action, who are the plaintiffs and petitioners herein, consist of three entities and their representatives and various individual plaintiffs acting for themselves and a class of persons who had direct involvement and association with the primates which are one subject of this litigation. Some of that direct involvement, as hereafter noted, included specific care, both before and after seizure of the primates involved, and the expenditure of substantial time and sums of money by them in doing so. These entities, in the order listed in the complaint, are the International Primate Protection League, the Animal

Law Enforcement Association, and People for the Ethical Treatment of Animals, Inc. The individual plaintiffs appear in the caption of the case and in the foregoing listing of parties to this Petition.*/

The suit, hereafter more fully described, alleged the circumstances of

*/ Persons who filed affidavits or were involved with the entities as members and active in the proceedings are Ingrid Newkirk and Alex Pacheco, both connected with People for the Ethical Treatment of Animals (PETA). Ms. Newkirk and Jean Goldenberg were also associated with the Animal Law Enforcement Association and were humane officers with state authority to arrest. They were individually involved in the monkeys' care after seizure by the police, along with others. Shirley McGreal is a leader in the International Primate Protection League (IPPL). It might be noted that, among other matters, the relief they requested included declaratory relief, adjudications as to inhumane treatment beyond that considered under the limitations of in criminal charges, the appointment of the plaintiffs as custodians or guardians and damage claims for moneys and effort expended.

a seizure of the 17 primates from the business of the respondent, the Institute for Behavioral Research ("Behavioral"); the pendency of criminal charges in the state courts against Dr. Edward Taub, then a principal of it; the inadequacy of those proceedings to the issues of the bill of complaint; the direct and specific involvement of the plaintiffs or some of them in the care and maintenance of the primates, both before and after the seizure, and their interests in them, both specifically and generally; the extreme harm and likely death that would be inflicted upon the monkeys if they were ever returned to the principals or otherwise released; and other matters hereafter noted.

The defendants in that action, who are the respondents in this cause, consist of the following, as already

noted: the Institute For Behavioral Research, Inc. (called "IBR" below or "Behavioral" hereafter), a profit-making "private" business; the National Institutes of Health and its Animal Laboratory; the Public Health Service; and the Department of Health and Human Services, and their successors, including their specific officers-in-charge (generally or collectively called "NIH" or the federal defendants hereafter) (Pet.App. 68-73).

Two individual defendants are also named: Richard Swain, then Sergeant of the county police department involved in the seizure hereafter referred to; and James Stunkard, D.V.M. Officer Swain was only a nominal defendant because he was Montgomery County's court-ordered custodian after seizure. Dr. Stunkard was eliminated from the

case without prejudice, after the death of one of the monkeys when they were returned for a short time to Behavioral, and there was a transfer to NIH by a Circuit Court order (R.25).

The Petition for Removal, which was given the docket number 81-3246, was responded to on January 11, 1982 with a statement that the petition was not opposed ". . . on condition the full cause and full claims, state and federal, are heard herein", and ". . . if the court preserves the rights of the parties" to them (Pet.App. 105-106).

During same month, the appellee Institute for Behavioral Research filed its Motion to Dismiss under "Rule 12(b)(6)" with memorandum and exhibits (R.10). It might be noted that while it raised standing issues, its primary focus claimed that ". . . more fundamen-

tally, the complaint should be dismissed because the basic issue raised by the plaintiffs is currently before the Maryland state courts" (R.10).

Shortly thereafter, the defendant-respondents, NIH and Health and Human Services, submitted their motion to dismiss or, in the alternative, to transfer the case to the District of Columbia for consideration by that court in connection with a case involving the monkeys brought solely under the Animal Welfare Act, 7 U.S.C. § 2131, et seq. (R.11, Appendix below 226-284).

Plaintiffs filed their oppositions on January 28 and February 11, 1982 (R.12, R.13, Appendix below 299, 300, 285-308). No action on the request to transfer to the District of Columbia was taken, perhaps because that court

(Judge Gesell) dismissed the suit on "mandamus" issues in the civil action noted in the opinion (Appendix below 330). Of note is the fact that he found the standing issue there presented a "close question", and further noted that it was a ". . . problem of first impression in this recondite field of law. Cf. Animal Welfare Institute v. Kreps, 561 F.2d 1002, 1007 (D.C.Cir. 1977), cert. denied, 434 U.S. 1013, 96 S.Ct. 726 (1978)." Id. As a result, he determined that ". . . the better course is simply to assume that the minimum degree of standing exists, and to dispose of the case on the merits. . . ." Id.

Concerning the conditions that existed as of December 1981, following the September 11, 1981 seizure, the petitioners alleged (Pet.App. 71-74):

2. The seizure of the primates was effected by defendant Swain, a member of the Montgomery County Police Department who remains their custodian. They presently reside at the Poolesville, Maryland facility for the National Institutes of Health (NIH), a branch of the Public Health Service (PHS), which is in turn an agency of the defendant Department of Health and Human Services (HHS).

* * *

4. The criminal proceedings which arose from that seizure resulted in a trial of a principal of Behavioral, Edward Taub, in the District Court for Montgomery County, which lasted

about a week, resulted in the filing of extensive memoranda, and concluded with a finding of his guilt on 6 of 17 counts on November 23, 1981. Defendant Taub has since filed an appeal. Pertinent documents filed in that proceeding are appended.

The complaint footnoted the death of one primate after return to Behavioral, and further alleged (Pet.App. 77):

> 7. The said primates will have inflicted on them unnecessary cruelty or death unless the relief here sought is granted. For the reasons stated, there is no other effective remedy or proceeding to consider

or grant the immediate and full relief necessary to avoid this result; nor any person or entity to do so except these plaintiffs, or those similarly situated and affected, who might maintain an action to protect and provide for the current and future safety, health and lives of the said primates or the avoidance of further unnecessary cruelties to them.

They asserted state and taxpayer status affected by public expenditures to deal with the claimed wrongs (paragraph 9d, Pet.App. 85, 97-98); and a charging lien or like "lien in providing for care of the said primates" under state statutes following the September seizure (see paragraph 8,

Appendix below, and 9c, Pet.App. 84, 97-98).

Before elaborating still further on these matters or their specific interests and specific contacts with the primates, the plaintiffs described themselves, their activities and the disappearing condition of primates in the verified complaint, where it was stated (Pet.App. 78-79):

> (a) The International Primate Protection League, a non-profit corporation, founded in 1973. It is the primary international organization dealing with the preservation and well-being of primates, whose members and board include recognized authorities and experts in the field. Beside its headquarters in this country, it also has a special office at the

Regent Arcade House in London, England. It has Field Representatives in 20 countries, in particular: Australia, Bangladesh, Brazil, Canada, Ghana, Hong Kong, India, Japan, Kenya, Netherlands, Pakistan, Singapore, South Africa, Southwest Africa, Taiwan, Tanzania, Thailand, the United Kingdom, Vietnam and Zimbabwe. In its description of its activities, the League, after observing that many of its officers "have lived for long periods with primates in their natural habitats," then asserts these true facts:

"Primates are disappearing at an alarming rate. Every primate species is listed on the appendices of the Convention on International Trade in Endangered Species.

The next plaintiffs noted are then described (Pet.App. 81): They are

> (b) The Animal Law Enforcement Association . . . a corporation formed . . . to pursue non-profit goals related to effective enforcement and improvement of animal cruelty laws and procedures in this State. Its chief members are humane officers given specific powers under the statutes of this State, Article 27, Section 59, et seq. to seize cruelly treated animals and cause the arrest of those responsible. . . . [The Act was appended to the complaint; it provided for post-conviction forfeiture in Section 67, and claims for care in Section 68].

Appendix below 152-153, and hereafter.

* * *

(c) People for the Ethical Treatment of Animals, Inc. (hereafter called PETA) . . . acts in this state and elsewhere to carry out the purposes above described. . . . In addition, it has provided special care and treatment and the funds therefore related to the very primates which are the subject of this action. [As set forth in a footnote, PETA personally is alleged to have expended over $6,000 for their care of the specific monkeys involved, exclusive of time.] (Pet.App. 83-84).

* * *

(d) The remaining individual plaintiffs set forth in the caption are all residents and taxpayers in the county, asserting the same and similar interests as the other plaintiffs as well as their federal and state taxpayer status that affords an additional interest. On the bases stated herein these plaintiffs aver that the substantial expenditure of public (state) funds in prosecution or post-conviction proceedings, inadequate to full relief, would not be necessary if the declaratory and general relief here sought were granted. (Pet.App. 85) [As noted hereafter, all further alleged they had direct bonding and observational

relationships with these specific primates.]

The complaint then asserted, with supporting authorities (Pet.App. 87):

> 12. The non-human primates involved are among the most advanced non-humans, more closely akin in their "human" needs and characteristics than animal species generally. It is well established that they are particularly sensitive to psychological stress because of their nature, capabilities and culture, a factor not addressed in criminal proceedings. (The footnoted references provided the studies in this regard.)

It then set forth further facts pertinent to the claims, the principals and their true purposes (funding for its own sake) (paragraphs 13-14, with footnotes omitted) (Pet.App. 88-89):

> 13. Background Facts. The primates here involved arose from purchases for certain alleged research evidently to be undertaken only if the funds were provided by the federal government. The original "Grant Application" made on June 30, 1979 in the sum of Three Hundred One Thousand Five Hundred Twenty-two Dollars ($301,522) for the period from April 1, 1980 through March 31, 1983 or slightly under One Hundred Thousand Dollars ($100,000) per year, reflected

> that annually "supplies" would consist of, among other things, "six (6) monkeys at $200 (Two Hundred Dollars) each" (p.3) and maintenance of "30 monkeys at 55 cents per day." It included a charge to the government, if approved, of at least $400 a year for veterinary services (p. 3). . . .

The suit then referred to events which tended to show a pattern of duplicative and unnecessary research reflected in dozens of studies, a critique which NIH itself had written in 1979, during which it noted use of monkeys was simply not required (Pet.App. 88-91).

Acknowledging that this area was then more difficult to address for obvious policy reasons that do not

discourage valid and proper research, or involve issues of funding for its own sake, the plaintiffs further averred then and later that (a) Behavioral was not engaged in bona fide research; (b) that as these events extended on there was no longer a scientific value in the project in any event; (c) that with the ultimate loss of the grant and funding, and the stopping of all research by NIH itself, the monkeys were in fact abandoned or to be treated as such; and (d) given the extreme cruelties expected, and in fact, the proposed extinction of the primates, and the inadequacy of the criminal law to deal with them by proper civil or "equity" standards, and the utter disregard of humane treatment in the circumstances, the conditions were such as to warrant the forfeiture contemplated by the statutes and laws of

the State of Maryland, entitling the plaintiffs or some of them to be custodians or guardians.

In this regard, it might also be noted that Behavioral had not only failed to comply with the law and NIH rules, it evidently violated its own representations upon which it obtained the grant (e.g., Pet.App. 92, paragraph 14 and footnote, 15, 17).

In short, the issues of "ownership" waiver or abandonment, or the remedial right to forfeiture or appropriate relief in the face of extreme cruelty to sentient beings was in dispute, irrespective of the terms of the grant or federal statutes.

Related to these claims were further circumstances surrounding the seizure that form the basis of the suit and later claims. For the purposes of

this Petition, they are stated in paragraph 15 of the complaint from the affidavit in support of the search warrant (Pet.App. 93, et seq.), namely:

> 1. That on the 8th day of September, 1981, at 2000 hours, Sgt. Richard W. Swain, Jr. received information from Alex Pacheco that the Institute for Behavioral Research, Inc., through various individuals, was inflicting unnecessary suffering upon non-human primates at the premises captioned above and presently is unnecessarily failing to provide these monkeys with nutritious food in sufficient quantity, necessary veterinary care, proper drink, air, space and shelter.

2. (That) Mr. Pacheco is the chairperson for People for the Ethical Treatment of Animals, Inc., an animal protection organization designed to promote the rights and protection of animals. Alex Pacheco was born on August 19, 1958 in Joliet, Illinois. Alex Pacheco is a third year undergraduate student at George Washington University, majoring in Environmental Studies. He is founder and Director of People for the Ethical Treatment of Animals, Inc., an animal rights and protection organization based in Washington, D.C. . . .

His further background and studies are then described.

Pertinent to the conditions and to issues of relief available to the plaintiffs' by virtue of their bonding, contacts, observations, studies, and their personal, specific, and even educational interests in the use of these events, there were other facts asserted, under oath, which in turn involve waiver questions (Pet.App. 95-96):

> . . . during the week of May 11, 1981, he offered to do volunteer work at the premises. (App. 21)
>
> . . . From the week of May 11, 1981 until September 6, 1981, Mr. Pacheco stated that he has been in the premises on a regular basis . . . was given the keys . . . and was given carte blanche authority to enter the premises

to observe the primates at any time. . . .

3. Mr. Pacheco advised Sgt. Swain on the 8th day of September, 1981, that he has entered the premises since the week of May 11, 1981 to the present on at least forty (40) occasions. . . . (Id.)

The details of the wholly inhumane and gross conditions of Behavioral's business at the time are then described, followed by similar observations of experts, when it was noted (Pet.App. 9):

6. On the 8th day of September, 1981, Mr. Pacheco advised that he has personally

> consulted with eminent experts in the area of animal behavior, veterinary medical science, zoology, primatology, psychology, and anatomy. He advises further, on the 8th day of September, 1981, that these experts have recently entered the premises in question and made observations, which are recorded in their respective Affidavits, copies of which are attached hereto and incorporated herein. . . .

Not only were those affidavits appended to the complaint as exhibits to it and to the seizure warrant, there were others provided by some of the same persons examining the premises after seizure and bearing upon the reliability or true purposes of Taub/IBR. One, by

Dr. Geza Teleki (Exhibit N) noted the observed conditions, and then stated (Appendix below 183):

> It is my considered professional opinion, as a career primatologist with some 1,000 hours experience in observing primates in laboratory conditions as well as over 4,000 hours experience studying primates in free-ranging conditions, that . . . evidence of mistreatment and inadequate care collected by me on previous visits (27 August 1981 and 11 September 1981) . . . clearly demonstrates that IBR is either unaware of or unwilling to upgrade the premises and the care/maintenance procedures to the minimum standards . . .

It should be noted that the physical and mental and behavioral condition of the primates, which according to all forms of evidence available to me from personal observation and from police records and veterinary records was far below the accepted standards by which reputable research laboratories operate, had in most instances nothing whatsoever to do with routine experimental procedures and protocols. The neglect and abuse evident from these records stems from cavalier and nonchalant attitudes by IBR personnel, who failed over an extended time period of months and perhaps years to provide the basic care, treatment, nutrition, and

environmental conditions that would have ensured health and reduced contamination of experimental results.

Affidavits of Dr. Michael W. Fox, Scientific Director of the Humane Society of the United States, and veterinarian with advanced degrees in medicine and animal psychology behavior, also confirmed the obviousness of the conditions.

Appended to the complaint as well was a Report and Recommendations of the NIH Committee to Investigate Alleged Animal Care Violations at the Institute for Behavioral Research, October 5, 1981, attached as Exhibit E (Appendix below 118-149). It described how NIH became involved, and what was found. For example, it noted (Appendix below 124):

I. Summary

A. Through news media reports on September 11, 1981, the National Institutes of Health (NIH) became aware of alleged violations of Public Health Service (PHS) policy regarding the care and use of laboratory animals and maintenance of the facilities in which they are housed.*/ . . . It has since been ascertained that the monkeys

*/ It was noted later that on that day, "Dr. O'Donnell, Acting Director, DRR, was alerted by ABC television newsman Roger Karas of the raid at the IBR Silver Spring facility. The Associate Director for Extramural Research and Training (ADERT), the NINCDS, and the OPRR were all notified and consulted (Tab E)." (Appendix below 127)

were being used for studies funded by NIH.

It then concluded that (Appendix below 125):

G. Based upon the NIH Committee's review of relevant PHS grant and assurance requirements and documents, interviews with the IBR Principal Investigators and members of the IBR Animal Care Committee, examination of the IBR laboratory facilities, and review of pictorial and documentary evidence provided by Maryland officials, the NIH Committee determined that IBR failed to comply with

the PHS Animal Welfare Policy and the corresponding NIH Guide for the Care and Use of Laboratory Animals in the following respects:

1. Adequate veterinary care is not provided.

2. The Animal Care Committee is not properly constituted and fails to provide adequate oversight of the facilities and the IBR's procedures for the care and use of the animals.

3. The physical facilities for housing the monkeys are inadequate.

4. The occupational health program for IBR staff is inadequate.

5. The condition of the laboratory on September 11 (as depicted in police photographs) was grossly unsanitary.

This summary, however, did not deal with what occurred following the seizure as it pertained to these plaintiffs and their further personal and specific interests.

It was they --- a variety of experienced groups and persons --- or some of them, who directly provided care, treatment and shelter of the primates. They, or some of them, also pursued their professional interests in

observation of the effects of these very kinds of actions on such primates, both in pursuit of their claims and interests in this case and generally.

In this regard, the verified complaint noted in paragraph 18, Pet.App. 97-98, noted that a portion of a home on Beall Avenue in Rockville was specifically altered for the primates' immediate care in the critical period, caretaking and professional personnel provided, and considerable expense incurred in the humane maintenance of these primates, which was otherwise a state, Behavioral and NIH obligation, thereby saving substantial state tax revenues (apart from their lien rights under the Maryland Code or general law).*/

*/ It was claimed during the appeal that the recent direct maintenance costs alone are over $30,000 yearly.

It was asserted that the total sums expended by petitioners exceeded Ten Thousand Dollars ($10,000.00), exclusive of necessary attorneys' fees, and that this care required the time of Ms. Newkirk, Ms. Goldenberg, and many others, including the other individual plaintiffs or members of the class (e.g., paragraphs 17-18, Pet.App. 97-98).

The remaining allegations described certain post-seizure events, including the efforts of IBR to obtain the primates; the pendency of the criminal charges against Taub; the conditioned return, then the ultimate re-transfer to NIH a week after an October 2, 1981 order, following the death of one of the monkeys and the injury of another at IBR (paragraphs 19-21); a further reference to the circumstances of the NIH findings and

the cutting-off of the NIH funding on the same day (paragraphs 22-23); the post-seizure affidavits; and the results of the District Court conviction.

In this regard, it alleged in detail why neither the criminal proceedings under the Maryland Code nor the seized property proceedings under it were adequate; what evidence was not considered; the different burdens of proof; and the other matters as to the plaintiffs' and the primates' interests that were neither addressed nor considered in them or through NIH, or in any other forum; and that to deny relief effectively denied them court access or created an "impenetrable barrier" to their personal and specific interests in these specifically-named primates and/or to appropriate relief to prevent their unnecessary suffering or death, or the

extinction of primates whom they had come to know, both before and after the seizure, and well prior to this litigation (para. 24-28).

It has been noted that following removal from the state court where it was filed, the cause proceeded in the federal court, while the criminal proceedings, grant withdrawals and suspensions and the other actions against Behavioral continued.

It might also be noted that, reflected in part by a memorandum document between the parties dated February 19, 1982 and reported in status proceedings, it is undisputed that some of the plaintiffs continued their specific bonding and observational contacts with the primates, not only before the seizure and litigation as alleged, but also during the pendency of the case

(Appendix below 411; 482-485).

It is undisputed as well that it continued through all proceedings in the lower courts.

Putting aside events before seizure or suit, or what occurred in the three years that the matter and motion pended, it is useful to note that while NIH filed its motion to dismiss on November 4, 1982, largely on federal standing grounds, it was not determined until January 1985, following their referral to Magistrate Smalkin for further action.*/

---

*/ Certain proceedings had been occurring in connection with the actions by NIH on the grant, during which Dr. Taub's formal status at Behavioral was evidently uncertain. As Behavioral's motion to dismiss reflects, Dr. Taub was found guilty on certain charges in the District Court. On appeal, a later jury conviction was set aside in August 1983 on the ground that the then-existing statute did not cover such facilities as that

FOOTNOTE CONTINUED --

Without granting any notice, hearing, or even any oral argument, as requested, and without having any further information concerning events which had transpired since the original motions, more than two years earlier, during which the Behavioral grant was fully terminated and NIH continued to house the primates at its Poolesville, Maryland facility, Magistrate Smalkin filed his "Report and Recommendation", dated January 16, 1985, on January 17, 1985 (R.26, Pet.App. 35-58).

FOOTNOTE CONTINUED --
which Taub's claimed to be (the issue of good faith or justification for the alleged experiments to the side). See Taub v. State, 296 Md. 439, 463 A.2d 819 (1983). The Magistrate heavily relied on the case (Pet.App. 37-38, 47-48). Unfortunately, he evidently did not realize that following Taub, the State of Maryland passed legislation expressly covering the facility --- a point obviously pertinent to its premises and the need for a full review by an Article III judge.

On April 9, 1985, without any hearing or oral argument or any other action as requested, the Honorable John Hargrove overruled the detailed and filed exceptions, and affirmed and adopted the "Report and Recommendation" of the Magistrate in a single page order based on an alleged "de novo" "review", he granted the motions to dismiss, and accordingly dismissed the cause on the basis of alleged lack of standing (R.32, Pet.App. 59-60).

On April 19, 1985, the plaintiffs timely filed a motion for an order altering or amending the judgment with a request for hearing and other relief (R.33).

Eleven days later, the federal defendants responded to the motion (R.34, Appendix below 471-475).

Behavioral filed no opposition.

In spite of the request for hearing, for further discovery and an evidentiary proceeding, and in spite of the matters set forth in the motion and the legal points raised in it (and incorporating past positions as well), Judge Hargrove denied the motion by an order which was dated November 19, 1985, and was entered on the docket sheet on November 20, 1985 (R.36, Pet.App. 63-64).

In neither did the court attempt to state its grounds, separately or in support of those asserted by the Magistrate.

On December 18, 1985, the plaintiffs timely filed their notice of appeal (R.37, Appendix below 479-480).

It may be useful to note that during the proceedings, a letter of September 24, 1985, exchanged between Dr. William F. Raub, who testified in

the October 1981 hearings and the representatives of the defendant, Institute for Behavioral Resources, specifically reflects a resolution by Behavioral that "IBR relinquish ownership to NIH of the fifteen primates presently under NIH care." (Pet.App. 107). It then stated that the action taken was because ". . . the primates do not fit into the present IBR program"; that "Dr. Taub will not continue to pursue this research effort, and will not require further use of the primates." (Pet.App. 107-108). It then released all of its interests. The full document appears in the Petition Appendix at 107-109. Quite obviously, it bears heavily on any claims that this action could have ever transferred with any alleged medical research or indeed, that any remedies being pursued would have done so.

While NIH rejected the offer in a reply letter, it was quite properly noted below that had full discovery been granted, a full hearing given, and full consideration provided to this document, the grounds for denial of standing would appear to have little or no basis.

ARGUMENT

Reasons for Allowance of the Writ

Introductory Statement. The foregoing statement of pertinent facts, including its references to the extent of amici involvement, specific Congressional hearings, and the nature of the subject matter, would suggest that this decision is both in conflict with decisions of other circuits on significant issues of wide-ranging

importance, and has departed from the usual course of judicial standards, or so far approved and sanctioned significant departures from appropriate principles, that the grant of this petition is more than warranted to settle important questions of federal law and procedure.

The Further Points Supporting Grant of the Writ

1. While the Magistrate was prepared to undertake to determine questions of state law, the Fourth Circuit determined that it would not entertain such considerations.

Petitioners' position before it was not merely that the Magistrate grossly misread available state law relief, by overlooking probable remedies

implied in Article 27, Section 68 (Pet.App. 121), which expressly provides rights against the owner to those who provide necessary care and treatment (or even rights to claims under Section 63 or 67 for abandonment or waiver or release), or those under the very expansive state tax rights asserted. It was also that if it did not consider those claims, it was required to remand the case to the state court because, since this was a removed proceeding, that relief is mandated under the removal statutes noted above and implicit in other circuit or federal cases such as Naylor v. McGrath, 585 F.2d 557 (2nd Cir. 1978); Swett v. Schenk, 792 F.2d 1447, 1450 (9th Cir. 1986). See also Ring v. River Walk Manor, 596 F.Supp. 393 (D.Md. 1984).

Bearing in mind that NIH did

take the position that its "custody" did not give it ownership rights, and indeed, it expressly denied all ownership rights, that relief in the state courts was potentially available against Behavioral under state law in connection with state taxpayer status, waiver and abandonment questions, the assertion of rights under Maryland statutes such as Article 27, § 68, and related relief.

2. The Fourth Circuit's decision appears to take the view that because the plaintiffs were allegedly volunteers in some regard, that their standing was not affected, or that they developed it out of the litigation itself.

First of all, of course, Mr. Pacheco had had his specific contacts with the primates involved long before

the seizure; and secondly, the caring and treatment of the primates occurred well before the litigation in this case.

Independent of that, however, we would note some of what we observed below:

(a) Patently, this record has specific contacts and claims that were absent in Sierra Club, where the petitioners never went to the area involved. See Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361 (1972).

(b) The alleged legal distinction of who was an alleged volunteer and its effect on standing principles is presented by the Fourth Circuit without any logical basis or actual authority.

On the slightest inquiry, it fails to be a reasoned basis for denying "standing" when only the following

points are noted: users of public parks engage in "volunteer" action simply by going there, often paying user fees; and many people undertake voluntary actions (refuse a poll tax or entry fee) to contest an action.

The contentions that this could ever be a reasoned or precedential basis for denying standing is directly contrary to the points we urged and the Opinion overlooked about SCRAP. See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405 (1973).

Nowhere does the law state or imply that the adversely affected must act under some compulsion or not be willing pursuers of rights. Kreps, supra, in fact indicates wholly to the contrary.

Indeed, in many material cases,

they were persons expressly pursuing a principled or "test" case, including the students involved in SCRAP itself or those in Kreps.

The issue is simply whether their interest is specific enough, however small, to assure a concrete decision, and thus only whether any one of them have some stake, however minor, "in the outcome of the litigation", not simply an interest in the problem alone. See SCRAP, supra.

The Fourth Circuit's current ruling is a self-created substantial incursion into significant standing standards --- created for the first time in clear conflict with other circuits, and even the import of SCRAP, Kreps, and related cases we have cited, including those in that very circuit (e.g., Goyan and Benton). See Pacific Legal

Foundation v. Goyan, 664 F.2d 1221 (4th Cir. 1981), and Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis, 701 F.2d 784 (9th Cir. 1983).

Finally in this regard, the alleged distinction ignores what occurred both before the seizure and suit: Mr. Pacheco, a member of the very group noted as plaintiffs, had been with these monkeys on over 40 occasions.

In short, the appellate finding that the plaintiffs could not see the primates "at IBR", but for the litigation, is contrary to the issues at the time of the 1985 ruling and the record even at the time of suit. They did see them at the federal NIH Poolesville facility --- which is what the conditions were at the time of suit, and more to the point, Mr. Pacheco, a member of a plaintiff organization, saw

them at IBR at least 40 times before suit or any litigation.

Our grounds and points also include the fact that (1) the Opinion is in conflict with the import and rulings in its own circuit that imply remedies in State of West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981); (2) in resolving disputed matters on motions under Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982), and particularly its en banc ruling in Dickey v. Greene, 729 F.2d 957 (4th Cir. 1984), both of which would require remand to the district court rather than resolution or fact-finding on the appeal; and (3) by so obviously and significantly misreading a major case on which it relies, Animal Lovers Volunteer Association, Inc. (A.L.V.A.) v. Weinberger, 765 F.2d 937 (9th Cir.

1985), which involved a closed enclave and in fact, earlier granted the Fund for Animals standing on less grounds than those here.

3. One of the further points made in this proceeding was that NIH persistently maintained that it had no remedial rights or authority. We pointed out below, and do note here, that both under non-statutory principles earlier adopted in the Fourth Circuit itself (in State of West Virginia v. Board of Education, supra, and by virtue of 45 C.F.R. Section 74-113 (Pet.App. 112), it did do so. Its failure to act in forfeiting the primates seems a breach of the very standards demanded by that law and those regulations; and in fact, is contrary to what was evidently represented to Congress in the October

1981 hearings by NIH itself.*/

4. Finally, there is the question, and an important one, regarding the apparent conflict between the decision and handling of the matter in the lower court, and the standards set forth in Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984), cert.

*/ It might be noted that in those proceedings, there was a reference to certain Policy Guides. NIH's evident theory was that once moneys are used for the purchase of equipment or supplies, they belong to the grantee, and they viewed the primates as "equipment" or "supplies" under the guides or regulations.

It was pointed out that those sections of the regulations are separate and distinct from those involving the care of laboratory animals, and that, therefore, NIH's interpretation of its forfeiture authority or rights to claim or release the primates to others was clearly erroneous. The issue in this aspect was about available remedies under the law when a grant is terminated (or the term of the grant clearly violated), and what could be done by the agency when that occurred.

denied, ____ U.S. ____, 105 S.Ct. 100 (1985).

This was a case in which there not even a de novo "determination", but rather only a purported "de novo review", with no articulated reasons, when they were absolutely required once it was plain that the magistrate was evidently not aware of certain facts or law at the time of his Report in January 1985. Any one of those factors would have required a careful analysis by an Article III judge to assure a determination by that court, rather than what was implicitly disapproved in Pacemaker. That, too, is an issue which needs to be settled by this Court because of its extensive effect and the seeming disparate approaches in the various federal courts and circuits.

CONCLUSION

Quite clearly, the grant of petitions such as these must inevitably depend on this Court's determination of the appropriate allocation of its resources to issues it must settle.

This case, factually and procedurally, is one seemingly presenting strong reasons to use those resources to determine the issues presented for review. We submit that the Petition should be granted.

Edward L. Genn
107 West Jefferson Street
Rockville, Maryland 20850
(301) 424-8400
or (202) 638-2027
Counsel of Record for
Petitioner

January 5, 1987

INDEX TO PETITION APPENDIX

	Pet.App.
Published Opinion of United States Court of Appeals for the Fourth Circuit, International Primate Protection League, etc., et al. v. Institute for Behavioral Research, Inc., etc., et al., No. 86-1508, Filed and Decided September 4, 1986	1
Magistrate's Report and Recommendation Dismissing Suit, Filed January 17, 1985	35
Order of United States District Court for the District of Maryland Affirming Magistrate's Report and Recommendation, Filed April 9, 1985	59
Fourth Circuit Court of Appeals Denial of Petition for Rehearing and Suggestion for Rehearing In Banc, Filed October 7, 1986	61

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-1508

PUBLISHED*/

International Primate Protection League, a non-profit corporation; Animal Law Enforcement Association, a corporation; People for Ethical Treatment of Animals, Inc., a corporation; Alex Hershaft; Pamela Chapman; Jo Shoesmith; Virginia Bourquardez; Peter W. Solem, Esq. and Bertha K. Solem; and Sherryl R. Thomas, for themselves and the class,

Appellants

---

*/ Published in 799 F.2d 934. West Publishing Company states that the case as printed in the Federal Reporter inadvertently omitted the Amici Curiae, who were granted leave to appear and whose names appear in the Fourth Circuit's Slip Opinion and hereafter.

versus

Institute for Behavioral Research, Inc., a corporation or its successors in interest and as agents and officers; Richard W. Swain, Jr., Sergeant, Montgomery County Police; and National Institutes of Health; Animal Laboratory, Poolesville, Maryland, a branch of the Public Health Service, Department of Health and Human Services and their successors,

Appellees

and

James V. Stunkard, D.V.M., Defendant.

and

American College of Surgeons,
American Council on Education,
American Psychological Association,
American Physiological Society,
American Society for Microbiology,

Association of American Medical Colleges,

Association of American Universities,

Federation of American Societies for Experimental Biology,

Federation of Behavioral, Psychological, and Cognitive Sciences,

National Association for Biomedical Research,

Society for Neuroscience,

National Association of State Universities and Land Grant Colleges,

National Society for Computers in Psychology,

Psychonomics Society,

Academy of Clinical Laboratory Physicians and Scientists,

American Academy of Neurology,

American Academy of Orthopaedic Surgeons,

American Academy of Otolaryngology - Head and Neck,

American Association for Thoracic Surgery,

American Association for the Surgery of Trauma,

American Association of Anatomists,

American Association of Chairmen of Departments of Psychiatry,

American Association of Neurological Surgeons,

American College of Psychiatrists,

American Federation for Clinical Research,

American Medical Association,

American Neurological Association,

American Orthopaedic Association,

American Pediatric Society,

American Psychiatric Association,

American Society for Cell Biology,

American Society for Clinical Pharmacology and Therapeutics,

American Society of Hematology,

American Surgical Association,

Association for Academic Psychiatry,

Association for the Behavioral Sciences and Medical Education,

Association of Academic Surgery,

Association of Anatomy Chairmen,

Association of Chairmen of Departments of Physiology,

Association of Departments of Family Medicine,

Association of Medical School Departments of Biochemistry,

Association of Medical School Microbiology Chairmen,

Association of Medical School Pediatric Department Chairmen,

Association of Orthopaedic Chairmen,

Association of Pathology Chairmen, Inc.,

Association of Program Directors in Internal Medicine,

Association of University Anesthetists,

Association of University Professors of Neurology,

Association of University Professors of Ophthalmology,

Associationof University Radiologists,

Biofeedback Society of America,

Departments of Otolaryngology,

Pavlovian Society,

Plastic Surgery Research Council,

Shock Society,

Society for Health and Human Values,

Society for Pediatric Research,

Society for Psychophysiological Research,

Society for Academic Anesthesia Chairmen, Inc.,

Society of Chairmen of Academic Radiology Departments,

Society of Critical Care Medicine,

Society of Radiology Research Associates,

Society of University Otolaryngologists,

Society of University Surgeons,

Surgical Infection Society,

University Association for Emergency

Medicine,

Amici Curiae.

Appeal from the United States
District Court for the
District of Maryland, at Baltimore.
John R. Hargrove, District Judge.
(HAR 81-3246).

Argued: May 8, 1986
Decided: September 4, 1986

Before WIDENER, ERVIN, and
WILKINSON, Circuit Judges.

Edward L. Genn (Gilbert J. Genn,

Rockville, Md., on brief) for appellants.

Robert B. Lanman, Legal Advisor,

Nat. Institutes of Health, Dept. of

Health and Human Services, and Edgar H.

Brenner (Arnold & Porter, Washington,

D.C., James R. Miller, Miller &

Steinberg, Rockville, Md., Breckinridge L. Willcox, U.S. Atty., Charles P. Scheeler, Asst. U.S. Atty., Baltimore, Md., on brief), for appellees.

Richard E. Verville, Peter S. Leyton, Grace Powers Monaco, Rebecca L. Burke, White, Fine & Verville, Washington, D. C., for amici curiae.

Before WIDENER, ERVIN, and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge.

In this case we must decide whether a group of private individuals may challenge a medical researcher's compliance with federal standards for the care of laboratory animals. Because we find that the plaintiffs lack standing to bring such a lawsuit, we affirm

the judgment of the district court in its dismissal of this action.

To imply a cause of action in these plaintiffs might entail serious consequences. It might open the use of animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be ill-advised. In fact, we are persuaded that Congress intended that the independence of medical research be respected and that administrative enforcement govern the Animal Welfare Act.

I.

The principal complainant in this case, Alex Pacheco, first met the principal defendant, Dr. Edward Taub, in May 1981.[1] Pacheco, an undergraduate student in the program of Environmental Studies at George Washington University in Washington, D.C., had worked frequently for the protection of animals, participating in projects of the Fund for Animals, the Friends of Animals, the Ohio Capital Area Humane Society, and the Alaska Department of Fish and Wildlife. He had founded the Ohio Animal Rights Committee and, in

1. Because the district court granted a motion to dismiss, we construct our account from the material allegations of the complaint. Allen v. Wright, 468 U.S. 737, 767 n. 1, 104 S.Ct. 3315, 3320 n. 1, 82 L.Ed.2d 556 (1984) (opinion of Justice Brennan).

Washington, D.C., had founded People for the Ethical Treatment of Animals, Inc. (PETA), on which he continued to serve as director. Taub, the chief of the Behavioral Biology Center of the Institute of Behavioral Research (IBR), was studying the capacity of monkeys to learn to use a limb after nerves had been severed. Funded by the National Institutes of Health (NIH), the project amplified Taub's earlier research in this area and attempted to discover benefits for the rehabilitation of human patients suffering from a serious neurological injury such as a stroke.[2]

2. See, e.g., Cohn, Jackniunas & Taub, Summated Cortical Evoked Response in the Deafferentated Primate, 178 Science 1113 (1972); Taub, Ellman & Berman, Deafferentation in Monkeys: Effect on Conditioned Grasp Response, 151 Science 593 (1966);
FOOTNOTE CONTINUED --

Pacheco offered to work as a volunteer for Taub on the neurological study at an IBR facility in Silver Spring, Maryland. Taub gave Pacheco the keys to the premises and permission to enter at any time, and Pacheco came regularly to the laboratory during the summer of 1981. He concluded from his observations that IBR did not provide the monkeys with sufficient food or water, a sanitary environment, or adequate veterinary care. On several nights during the week of August 27, 1981, Pacheco brought other researchers to IBR

FOOTNOTE CONTINUED --

Taub, Bacon & Berman, The Acquisition of Trace-Conditioned Avoidance Response After Deafferentation of the Responding Limb, 58 J. of Comparative & Physiological Psychology 275 (1965); Knapp, Taub & Berman, Effect of Deafferentation on a Conditioned Avoidance Response, 128 Science 842 (1958).

to confirm his impressions. Collecting affidavits from these visits with his own statement and photographs of the laboratory, Pacheco asked Sgt. Richard W. Swain, Jr. of the Montgomery County Police Department to investigate IBR for violations of Article 27, § 59 of the Maryland Code, which defines the criminal misdemeanor of cruelty to animals and authorizes a maximum fine of $1,000 for each offense.

Swain obtained a search warrant from the Circuit Court for Montgomery County and on September 11 seized from IBR the seventeen monkeys in the experiment. Nine days later, the Assistant State's Attorney for Montgomery County filed criminal charges against Taub in the county District Court, alleging seventeen violations of the animal cruelty statute.

On October 9 the Circuit Court for Montgomery County, without opposition from IBR, instructed Sgt. Swain and Dr. James Stunkard, a veterinarian, to supervise the transfer of the monkeys to an NIH facility in Poolesville, Maryland that Swain and Stunkard had chosen as the best place for temporary care and custody. The order was to remain in effect "until further Order of this Court or the termination of the pending criminal prosecution against Dr. Taub, whichever occurs first."

Dr. Taub stood trial in November 1981 in the District Court for Montgomery County, which on December 2 entered orders of conviction on six of the seventeen counts and acquittal on the other eleven counts. Fearing that the court order on custody of the monkeys would partially expire with the

acquittals, PETA acted quickly to prevent the return of any animals to IBR. Along with the International Primate Protection League, the Animal Law Enforcement Association, and several named individuals, PETA filed a bill of complaint on December 3 in the Circuit Court for Montgomery County. The complaint, in which the plaintiffs purported to speak for "their own and class interests and as next friends of seventeen (17) non-human primates,"[3] alleged that a civil inquiry would show IBR violations of the Maryland animal cruelty laws which the criminal trial had not established and further alleged that IBR had violated the federal Animal

3. One of the original seventeen monkeys died before the complaint was filed. We understand that one other monkey has since died and that fifteen animals are now involved.

Welfare Act, 7 U.S.C. §§ 2131 et seq. Naming IBR, NIH, Swain, and Stunkard as defendants, the plaintiffs asked the equity court to verify these claims, to designate the plaintiffs as new guardians of the monkeys, and to enjoin all parties from permitting IBR to regain possession.

On December 17, NIH requested removal of the case to the U.S. District Court for the District of Maryland. The plaintiffs did not oppose removal; as the complaint had noted, the claims arising under the Animal Welfare Act supported federal jurisdiction. Within two days, IBR moved to dismiss the action because the plaintiffs lacked standing to sue and within two weeks, NIH moved to dismiss the action for improper venue or to transfer the case to the U.S. District Court for the

District of Columbia for consolidation with Civil Action No. 81-2691, Humane Society of the United States v. Block, and Civil Action No. 81-2977, Fund for Animals v. Malone. The plaintiffs in the former case, including PETA, hoped to require the Secretary of Agriculture to enforce against Taub and IBR the provisions of the Animal Welfare Act. The plaintiff in the latter case sought a more general declaration of the duties of Secretary Block and NIH to control the research treatment of animals and also requested an injunction to prevent the return of the seized monkeys to Taub and IBR.

Before the federal district court in Maryland ruled on the motion to consolidate, the federal district court in Washington, D.C. dismissed Humane Society v. Block and Fund for Animals v.

Malone. In an April 1982 decision the court described the enforcement authority of NIH and Department of Agriculture officials as "wholly discretionary" and held that "given the absence of any express statutory directive requiring enforcement action where certain standards of care are not met, there is no duty owed to members of these plaintiff organizations nor can such a duty be implied."

Meanwhile, the Maryland criminal prosecution also moved toward resolution. Taub appealed his six District Court convictions to the Circuit Court for Montgomery County, where a jury after a new trial returned a verdict against Taub on one count of cruelty to animals. The Court of Appeals of Maryland then granted a writ of certiorari and in August 1983 reversed

the conviction, holding that Article 27, § 59 of the Maryland Code did not apply to an institution conducting medical research pursuant to a federal program. Taub v. State, 296 Md. 439, 463 A.2d 819 (1983).

With the conclusion of the other federal cases and with the expiration of the October 9, 1981 order upon the termination of criminal proceedings, this suit became the only remaining litigation about the custody of the monkeys. In January 1985 a federal magistrate in the District of Maryland recommended that the district court dismiss for lack of standing the suit against IBR, NIH, and Swain. (The parties had earlier stipulated to the dismissal of Stunkard.) Three months later, the district court adopted the report and recommendation of the

magistrate. When the district court refused in November to set aside the judgment, the plaintiffs appealed to this court. We affirm.

II.

[1] In order to sue in federal court, plaintiffs must show that they "personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979). Plaintiffs argue that they would suffer both financial and non-financial injuries if IBR regained control of the monkeys. Close examination of the allegations, however, shows that the claims do not provide standing for the

plaintiffs.

Plaintiffs assert that this case implicates their financial interests in two different ways. First, they argue that their tax payments entitle them to ensure that the law is respected by NIH, a federal agency, and by IBR, a recipient of federal funds. The Supreme Court rejected this reasoning in United States v. Richardson, 418 U.S. 166, 174-75, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974), holding that payment of taxes does not purchase authority to enforce regulatory restrictions. See generally Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464, 476-82, 102 S.Ct. 752, 760-64, 70 L.Ed.2d 700 (1982). Second, plaintiffs argue that they contributed to the maintenance of the monkeys after Sgt. Swain seized the

animals and before NIH took possession. But as the transfer receipt shows, this expenditure represented a voluntary offer to help the Maryland authorities. The plaintiffs did not acquire any interest in the monkeys, who remained the property of IBR and in the legal custody of Sgt. Swain. Like attorneys' fees or other litigation costs, the maintenance payments were part of the response to the contested conduct, not part of the conduct itself, and therefore do not establish "a personal stake in the outcome of the controversy." Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

The plaintiffs also assert that this case implicates their non-financial interests in two ways. On the more general level, the plaintiffs sought standing by describing themselves as

> individuals and members having a personal interest in the preservation and encouragement of civilized and humane treatment of animals, whose own aesthetic, conservational, and environmental interests are specifically and particularly offended and affected by the matters hereinafter described, and which interests, along with their educational interests, will be detrimentally impacted upon if the relief sought is not granted.

This statement of interest resembles the pleading that the Supreme Court found to be inadequate in Sierra Club v. Morton, 405 U.S. 727, 735 n. 8, 92 S.Ct. 1361, 1366 n. 8, 31 L.Ed.2d 636 (1972). The Court held that "a mere interest in a problem; no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to create standing. Id. at 739. That conclusion applies precisely to these plaintiffs' asserted commitment to the

humane treatment of animals. The commitment of an organization may enhance its legislative access; it does not, by itself, provide entry to a federal court.

Plaintiffs try to distinguish Sierra Club v. Morton by presenting a second, more specific, form of non-financial injury: the disruption of their personal relationship with these monkeys by the return of the animals to IBR. This theory seeks to compare plaintiffs with the parties who suffer injury from the disturbance of national parks or forests because they use those areas. Cf. Sierra Club v. Morton, 405 U.S. at 735 n. 8, 92 S.Ct. at 1366 n. 8. But that analogy fails because these plaintiffs have been with the monkeys primarily because of this litigation. Whereas the parties described in Sierra Club v. Morton could use the park if the

defendants complied with the law, these plaintiffs could not see the monkeys in the IBR laboratory if the defendants satisfied all requirements of care. See also Animal Welfare Institute v. Kreps, 561 F.2d at 1008; American Horse Protection Association v. Frizzell, 403 F.Supp. 1206, 1214 (D.Nev. 1975).

This situation is like that in Animals Lovers Volunteer Association (ALVA) v. Weinberger, 765 F.2d 937 (9th Cir. 1985), in which an organization challenged the treatment of goats in a federal enclave. The court found that the plaintiff had suffered no injury because its members could not be with the goats and therefore could not claim the direct personal involvement necessary for standing. "ALVA's injury is abstract at best," the court ruled, "and insufficient to remove ALVA from the

category of concerned bystander." Id. at 939. The same principles govern the relationship of these plaintiffs to the monkeys and establish that they, too, have not sustained an injury on which to predicate standing.

III.

[2] Not only do plaintiffs fail to allege cognizable injuries; they fail also to prove that the implicated federal statute authorizes their right to seek relief. The two shortcomings provide related, though alternative, bases for dismissal of this action.

The Animal Welfare Act, 7 U.S.C. §§ 2131 et seq., is the federal statute on which plaintiffs rely in defining their allegations of mistreatment. The Act seeks to insure that "animals intended

for use in research facilities ... are provided humane care and treatment." 7 U.S.C. § 2131(1). There is no indication, however, that Congress intended this goal to come at the expense of progress in medical research. To the contrary, both the language of the statute and the means chosen by Congress to enforce it preserve the hope that responsible primate research holds for the treatment and cure of humankind's most terrible afflictions. The statutory design is, in turn, inconsistent with the private right of action that plaintiffs assert.

The administrative enforcement that Congress envisioned for this statute is readily apparent.[4] The Act directs

4. Congress first formulated the Animal Welfare Act in 1966 and has incorporated substantial amendments in
FOOTNOTE CONTINUED --

the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals, but cautions that

FOOTNOTE CONTINUED

1970, 1976, and 1985, the most recent of which will become effective in December 1986. Our description refers to the details of the current Act, but our conclusions would apply as well to the pending version.

Under the revised statute, enforcement by the Secretary of Agriculture will be supplemented by the requirement that each research facility appoint an Institutional Animal Committee, including at least one veterinarian and one person not affiliated with the facility, to monitor the treatment of animals. The committee will report unconnected violations to the Department of Agriculture and to any federal agency that funds the research facility. 7 U.S.C. § 2143 (eff. December 23, 1986). This additional administrative system adopts for the Animal Welfare Act an approach that has been followed for many years by NIH. See H. Conf. Rep. No. 99-309, 99th Cong., 1st Sess., reprinted in 1985 U.S.Code Cong. & Ad.News 731, 746-48.

"nothing in this chapter shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to design, outlines, guidelines, or performance of actual research or experimentation by a research facility as determined by such research facility." 7 U.S.C. § 2143.

The resulting standards are set forth at 9 C.F.R. §§ 3.1-3.142. The standards applicable specifically to monkeys are at 9 C.F.R. §§ 3.75-3.91. These regulations establish requirements for housing, feeding and watering, sanitation, and veterinary care.

Further directing the Secretary to "make such inspections as he deems necessary" to determine whether a research facility complies with the standards, the Act confers investigatory powers similar to those exercised by the

Federal Trade Commission. 7 U.S.C. § 2146. To enforce the duties of animal care, the Secretary may issue a cease and desist order and may impose a maximum fine of $1000 for each day that each violation continues in a research laboratory, 7 U.S.C. § 2149(b). The Secretary may also remove an animal found to be suffering through the non-compliance of a laboratory --- but only if the animal "is no longer required by the research facility to carry out the research, test, or experiment for which such animal has been utilized." 7 U.S.C. § 2146(a).

A review of the Act thus underscores two points. One is a commitment to administrative supervision of animal welfare. The other is the subordination of such supervision to the continued independence of research scientists.

The Secretary's rule-making authority does not extend to the design of experiments; the Secretary's enforcement authority does not extend to the confiscation of animals in use. In the words of Congress, "Under this bill the research scientist still holds the key to the laboratory door." H.R.Rep. No. 91-1651, 91st Cong. & Ad. News 5103, 5104. See also S. Rep. No. 1281, 89th Cong., 2nd Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2635, 2637.

The amicus curiae brief of sixty-eight scientific and medical organizations reviews the history underlying these priorities. Research with primates helped to lead, for example, to the development of the polio vaccine, and other animal research has contributed to the discovery of insulin, the invention of transplantation tech-

niques, and the improvement of cancer therapies. Amici predict that animal research will play some part in the prevention and treatment of such illnesses as multiple sclerosis, AIDS, and Alzheimer's disease. Recent amendments to the Animal Welfare Act have accordingly reaffirmed the Congressional finding that "the use of animals is instrumental in certain research and education or for advancing knowledge of cures and treatments for diseases and injuries which afflict both humans and animals." H. Conf.Rep. No. 99-447, 99th Cong., 1st Sess., reprinted in 1985 U.S. Code Cong. & Ad. News 1676, 2518.

Consistent with this purpose, Congress crafted a comprehensive plan for the regulation, inspection, and sanction of medical facilities that utilize animals in research. It is

clear that the supervisory goals of the statute were to be realized through a regime of administrative enforcement, with a right of judicial review for an aggrieved facility. 7 U.S.C. § 2149(b). It is equally clear that these goals were not to be realized through a succession of private lawsuits. "The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 93-94, 101 S.Ct. 1571, 1581-84, 67 L.Ed.2d 750 (1981).

The uniformity and specialization normally thought to accompany regulatory oversight, in this case that of the Secretary, would not inhere in enforcement of the statute through private rights of action. Judges and juries

possess limited acquaintance with the problems and requirements of biomedical research. Their judgments and verdicts may fail to provide that modicum of consistency and predictability without which laboratory scientists would find it difficult to operate. To add extensive pre-trial discovery of a facility's practices to the administrative inspections already authorized by Congress, 7 U.S.C. § 2146, would impose a gratuitous burden upon federally funded research. Finally, the prospect of damage awards in excess of the prescribed statutory penalties might discourage scientists from entering many lines of medical inquiry. As the Supreme Court has noted in another context, "[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." Middlesex County Sewerage Authority v. National Sea Clammers

Association, 453 U.S. 1, 15, 101 S.Ct. 2615, 2623, 69 L.Ed.2d 435 (1981).

The Act, as our description suggests, does not imply any provision for lawsuits by private individuals as a complement to the authority of the Secretary of Agriculture. The plaintiffs therefore can draw no support from cases involving other statutes that do create standing for private individuals to challenge a particular treatment of animals. See Tennessee Valley Authority v. Hill, 437 U.S. 153, 164 n. 15, 98 S.Ct. 2279, 2287 n. 15, 57 L.Ed.2d 117 (1978) (Endangered Species Act); Animal Welfare Institute v. Kreps, 561 F.2d 1002, 1005-06 (D.C.Cir.1977), cert. denied, 434 U.S. 101, 98 S.Ct. 726, 54 L.Ed.2d 756 (1978) (Marine Mammal Protection Act). "The question whether a statute creates a cause of action,

either expressly or by implication, is basically a matter of statutory construction." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979). Here, we are convinced that Congress intended the administrative remedy to be the exclusive remedy. To accord plaintiffs standing to sue by virtue of a private cause of action would not conform to the aims of Congress in the Animal Welfare Act.

IV.

Plaintiffs also argue that Maryland state law supports their claims for custody of the monkeys. The federal courts, however, do not have jurisdiction to consider these claims. Because the citizenship of the parties is not

diverse, federal authority must exist through the doctrine of pendent jurisdiction. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). According to that doctrine, state claims should usually be dismissed if the federal claims have been dismissed before trial. Id. at 726, 86 S.Ct. at 1139.

That rule is particularly applicable to this suit because the federal claims have been dismissed for want of standing. Without a justiciable case or controversy, federal courts cannot address claims of state law. See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2nd § 3531.14.

The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

International Primate Protection, et.al.,	*	
Plaintiffs	*	
v.	*	Civil No. HAR 81-3246
	*	FILED 1/17/85
Institute for Behavioral Research, Inc., et al.,	*	
Defendant	*	

* * * * * *** * * * *

MAGISTRATE'S REPORT & RECOMMENDATION

I.

This action is an attempt by plaintiffs, who are several animal protection organizations and individuals, to prevent the return of seventeen primates (monkeys) to the laboratory from which they had earlier been seized (Institute for Behavioral Research, Inc. ("IBR")) by Richard W.

Swain, Jr., a member of the Montgomery County Police Department, pursuant to a warrant. IBR and Swain are among the defendants.

IBR was conducting laboratory research on the primates to examine the effects of somatosensory deafferentation, a procedure which involves cutting the spinal nerves that transmit sensation from the limbs to the brain. IBR's research was funded by a grant from a federal agency, defendant National Institutes of Health ("NIH") Animal Laboratory, a branch of the Public Health Service, Department of Health and Human Services.

Plaintiffs provided information to the Montgomery County Police Department, indicating that the primates were not being provided adequate care. The police, acting pursuant to a warrant

alleging a violation of Md. Ann. Code art. 27, §59 (1957, 1982 Repl. Vol.), a cruelty-to-animals statute, seized the primates. Dr. Edward Taub, Director of IBR and in charge of research on the primates, was criminally charged with numerous counts of animal cruelty under Maryland law. He was subsequently found guilty, in the District Court of Maryland for Montgomery County, of failure to provide six of the primates with necessary veterinary care. On appeal and trial de novo in the Circuit Court for Montgomery County, a jury found Taub guilty of one charge of failing to provide necessary veterinary care for one primate. Taub's conviction was reversed, though, by the Court of Appeals of Maryland, which held that the Maryland animal cruelty statute does not apply to medical research activities at

a federally funded laboratory that is subject to federal statutes and regulations.[1] The primates are currently in the custody and care of NIH.

II.

Plaintiffs brought this action to obtain an injunction enjoining the return of the primates by NIH to IBR. Presently pending before the Court is IBR's motion to dismiss for lack of standing, and NIH's motion to dismiss or transfer the action to the United States District Court for the District of Columbia.

Because the issue of standing is a threshold matter and because NIH's motion does not challenge the subject-matter jurisdiction of this Court, IBR's motion will be addressed first.

1. Taub v. State of Maryland, 296 Md. 439, 463 A.2d 819 (1983).

III.

A.

IBR moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss this action for failure to state a claim on which relief can be granted. Specifically, IBR claims that plaintiffs lack standing to bring this action, and, also, that plaintiffs' complaint should be dismissed as an attempted interference in a state court proceeding.

IBR's claim that plaintiffs lack standing rests on a number of grounds. IBR contends that plaintiffs do not own the primates and that the primates are not available to the public for observation or enjoyment. Furthermore, IBR contends that none of the plaintiffs can expect in the future to observe, study, or use the primates in any way. There would appear to be no

factual dispute as to any of these matters.

IBR relies on a number of Supreme Court cases that set guidelines for determining standing. First, IBR claims that plaintiffs have failed to show the requisite injury in fact, if the primates were to be returned to IBR. See Sierra Club v. Morton, 405 U.S. 727 (1972). Second, IBR contends that plaintiffs have failed to show that the interest that they seek to protect is within the zone of interests protected by the statute in question. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970)). [sic] Third, IBR claims that plaintiffs have not alleged an interest sufficient to create a case or controversy, and plaintiffs' mere general interest in the welfare of laboratory

animals is insufficient to confer standing under Sierra Club, supra, and Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). IBR also contends that it is the State of Maryland (if anyone) who has standing to bring this type of suit, and that the State cannot delegate that standing to plaintiffs, even if custody of the primates had been temporarily entrusted to some of the plaintiffs. Finally, IBR contends that there is no constitutionally sufficient nexus between plaintiffs' asserted interests and the claim sought to be adjudicated. Flast v. Cohen, 392 U.S. 83, 102 (1968).

B.

Plaintiffs oppose IBR's motion to dismiss. Plaintiffs argue that IBR's position is predicated on inaccurate and incomplete assumptions as to material

facts. Plaintiffs also claim that IBR's motion can deal only with the sufficiency of the allegations to state a cause of action or to furnish a basis for standing. Plaintiffs contend that IBR's argument of lack of standing ignores applicable law and does not touch upon the question of taxpayer standing of the individual plaintiffs.

Plaintiffs insist that they have standing in several ways. First, plaintiffs claim "taxpayer" standing under Flast v. Cohen, 392 U.S. 83 (1968). Second, plaintiffs claim that Association of Data Processing Service Organizations v. Camp, supra, confers standing because dicta in that case indicate that an interest sufficient to confer standing may reflect aesthetic, conservational and recreational values. Third, plaintiffs claim that Sierra

Club, supra, does not deny them standing, because they have been directly involved with the primates and therefore have an injury in fact, not just a generalized interest. Fourth, plaintiffs claim that U.S. v. S.C.R.A.P., 412 U.S. 669 (1973) gives them standing, because that case provides the setting for a focused consideration of a concrete injury. Plaintiffs also contend that IBR's reliance on Schlesinger, supra, is misplaced because it does not have the remotest bearing on this case. Finally, plaintiffs offer some cases that, they contend, hold that standing exists in a case such as this.

IV.

A.

The concept of standing in federal litigation involves the need to establish an entitlement to judicial

action, separate from the merits of the case. It is a concept that has roots both in the "case and controversy" requirement of Article III of the Constitution and in prudential concerns of a judicial management nature. Warth v. Seldin, 422 U.S. 490 (1975). Standing usually involves litigation asserting the illegality of governmental action, because private claims are almost always asserted by persons having a clearly recognizable and judicially enforceable interest. 13 Wright, Miller & Cooper, Federal Practice and Procedure: Civil §3531 (1975). Standing, at a minimum, involves determinations as to whether the plaintiff has suffered some type of judicially redressable injury. See, e.g., U.S. v. S.C.R.A.P., supra; Sierra Club, supra.

To determine whether the present plaintiffs have standing to bring this action, this Court must first examine the statute out of which this entire controversy arose, and it also must determine whether plaintiffs' interests are sufficient in light of the Supreme Court's cases on standing. Standing, in this case, has two distinct aspects: federal and state. This case was removed to this Court on the basis of an alleged contract between IBR and NIH, a federal agency. See 28 U.S.C. §§1346(a)(2); 1441. Even if this Court has statutory subject-matter jurisdiction as to the claims against NIH, the Article III and the prudential considerations of standing are still applicable to NIH. Although IBR is a private organization, to the extent that plaintiffs raise any federal claims against

it, the federal constitutional and prudential considerations as to standing will apply. However, regarding plaintiffs' state law claims against IBR, this Court will examine those claims with respect to the law of Maryland regarding standing. This Court is empowered to determine the state law claims in this case under 28 U.S.C. §1441(c). Cf. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

The first place one might look for standing is among the statutes invoked by the plaintiffs. This case had its origins in Md. Ann. Code art. 27, §59, which provides that cruelty to animals is a misdemeanor. One mechanism for enforcement of §59 is set forth in art. 27, §63, which provides that any officer of any society or association incorporated for the prevention of

cruelty to animals, incorporated in Maryland, may bring before the (State) court, offenders violating the law in relation to cruelty to animals. From the pleadings, it appears that at least some of the plaintiff organizations are within the enumeration of §63. It is clear that plaintiffs were the moving force behind the primates' seizure from IBR and the bringing of criminal charges against Taub, its director. Such a course of action was certainly within the legislative grant of criminal enforcement authority in §63. However, it is not clear that any part of the Maryland Code regarding cruelty to animals, or any other section for that matter, gives plaintiffs the right to bring a civil action in this or any other court for an injunction enjoining any cruelty-to-animals defendant (much

less one who stands guiltless as a matter of law) from again taking possession of animals. Moreover, in Taub v. State of Maryland, 296 Md. 439, 463 A.2d 819 (1983), the Court of Appeals of Maryland held that the Maryland cruelty to animals statute is not applicable to a federally funded research laboratory such as IBR. Therefore there is not even an arguably applicable Maryland statutory basis for plaintiffs' action.

B.

This court must next examine Supreme Court precedent to determine whether plaintiffs have any other non-statutory, meritorious claim to standing. Plaintiffs' argument of taxpayer standing under Flast v. Cohen, 392 U.S. 83 (1968) is utterly meritless. Flast was a narrow decision that has been even further narrowed by later

Supreme Court cases. See 13 Wright, Miller & Cooper, Federal Practice and Procedure: Civil §3531.1 (1984). In Flast, the Court held that where a statute (1) involves Congressional power under the taxing and spending clause of the Constitution, and where such statute (2) violates a specific constitutional limitation imposed on the taxing and spending power, a taxpayer has standing to challenge the statute. At the present time, the Supreme Court has only recognized taxpayer standing where the statute in question violated the Establishment clause of the Constitution, and no cases indicate any likely expansion of the Flast doctrine to other clauses of that document.

The Establishment clause is obviously not at issue in this case. In fact, there is nothing in this case that

even remotely rises to the level of a violation of any constitutional provision. Moreover, to raise taxpayer interest in a case such as this is to use it merely "...as a facade to cover the genuinely motivating interest." Id. at §3531.10. Accordingly, plaintiffs' claim of taxpayer standing will not be recognized by this Court.

C.

A review of the Supreme Court's rulings on standing convinces this Court that plaintiffs lack the standing to bring this action against NIH, and also against IBR with respect to any federal claims. In Sierra Club v. Morton, 405 U.S. 727 (1972), the Court was faced with a suit by the Sierra Club under the Administrative Procedure Act ("APA"), 5 U.S.C. §702. The Court held:

> ...a mere "interest in a problem," no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. ...But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short lived.

405 U.S. at 739. The argument to deny Sierra Club type standing to plaintiffs is even stronger in this case because the primates at issue are not the property of the Government or of the public. Although plaintiffs may have honestly believed they were performing a public service by bringing conditions affecting these primates to light, their present quest to enjoin the return of the primates is based only upon their

generalized interest in the future of the primates, rather than upon a legally recognized, judicially enforceable federal right to seek redress from an Article III Court.

D.

Questions of standing also involve consideration of the following prudential factors: whether there is an injury in fact; whether the zone of interests advanced is protected by statute and; whether plaintiffs have the power to advance the rights of others. Although the primates arguably may suffer some type of injury in fact if they are returned to IBR, the possibility of such injury is speculative and, if it would occur, the injury would be to the primates, not to the plaintiffs.

The zone of interests that plaintiffs advance in this case appears not to be protected by any applicable statute. As discussed, the pertinent Maryland Code sections have been held not applicable to IBR, and, in any event, they are designed to protect animals suffering present injury. Nothing in the Maryland Code provides for any type of injunction to protect animals against the mere possibility of future injury, nor does there appear to be any applicable federal statute justifying injunctive relief.

In short, plaintiffs simply do not have the power to advance the jus tertii of animals in this case. Although standing to assert the rights of others has been found in some cases, the unique circumstances justifying such "vicarious standing" are absent here.

See Griswold v. Connecticut, 381 U.S. 479 (1965). Federal case law simply does not confer standing upon animals, at this juncture.

Therefore, this Court holds that plaintiffs do not have standing to bring this action against NIH, or against IBR (or any other non-federal defendant) with respect to any federal claim.

V.

Because plaintiffs' claims against IBR and Swain raise issues of state law, it is necessary to determine whether the Maryland law of standing contains any prudential considerations that would bar plaintiffs from bringing this action in a Maryland court.

A review of Maryland law leads this Court to conclude that plaintiffs lack the standing to sue under Maryland

law as well as federal law. The only statute that remotely gives the organizational plaintiffs a right to bring an action is Md. Cts, & Jud. Proc. Code Ann. §6-406 (1984 Repl. Vol.). However, suit under that section is allowed only where the cause of action affects "the common property, rights, and liabilities of the group." It is utterly clear that plaintiffs have no property or other rights in these primates, other than a humanitarian interest in their welfare. Though commendable, that interest is not enforceable through a civil action. In Citizens Planning & Housing Association v. County Executive of Baltimore County, 273 Md. 333, 329 A.2d 681 (1974) the Court of Appeals of Maryland held:

> It has been generally recognized in this State that an association lacks standing to sue where it has no property interest

> of its own--separate and distinct from that of its individual members--which may be affected by any of the alleged acts under attack.

273 Md. at 345, 329 A.2d at 687 (citations omitted).

Nor do the individual plaintiffs have a right to sue. In Mayor and City Council of Baltimore v. Gill, 31 Md. 375, 394 (1869), the Court of Appeals stated that "[i]t is certainly well settled that public wrongs cannot be redressed at the suit of individuals, who have no other interest in the matter than the rest of the public. Thus an individual cannot maintain a bill of injunction to prevent a public nuisance, unless he suffers thereby some special damage...." The individual plaintiffs are merely representative of the rest of the public, in the present case. Therefore, this Court holds that plaintiffs

have no standing under Maryland law to bring this action against IBR or any other defendant against whom state law claims have been made.

Because this Court holds that plaintiffs do not have standing with respect to any defendant as to any claim, it is not necessary to address any of the other motions.

For the above reasons, it is, this 16th day of January, 1985, by the United States District Court for the District of Maryland,

RECOMMENDED that:

1. Defendant IBR's motion to dismiss for lack of standing to bring this action be granted.

2. Plaintiffs' suit, with respect to all other defendants, be dismissed for lack of standing.

3. The Clerk shall mail copies of this Report and Recommendation to counsel of record for the parties.

These recommendations are made subject to the provisions of Fed. R. Civ. P. 72 for taking exception hereto.

/s/
Frederic N. Smalkin
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

INTERNATIONAL PRIMATE PROTECTION, ET AL.	:	
v.	:	CIVIL NO. HAR 81-3246
INSTITUTE FOR BEHAVIORAL RESEARCH, INC., ET AL.	:	FILED 4/9/85

O R D E R

Upon consideration of the Report and Recommendation of United States Magistrate Frederic N. Smalkin, dated January 16, 1985, upon consideration of the exceptions filed thereto, and upon de novo review of the Magistrate's Report and Recommendation, IT IS, this 9th day of April, 1985, by the Court, ORDERED:

1. That the Magistrate's Report and Recommendation BE, and the same hereby IS, AFFIRMED and ADOPTED;

2. That defendant, Institute for Behavioral Research, Inc.'s, motion to

dismiss for lack of standing BE, and the same hereby IS, GRANTED;

3. That plaintiffs' suit, with respect to all other defendants, BE, and the same hereby IS, DISMISSED, for lack of standing;

4. That because the legal issues were fully brief by the parties, the Court has dispensed with oral hearing pursuant to Local Rule 6; and

5. That the Clerk of Court mail copies of this Order to counsel for the parties.

/s/
John R. Hargrove
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-1508

FILED OCT. 7, 1986
U.S. Court of Appeals
Fourth Circuit

International Primate
Protection, etc., et al.,

Appellants,

versus

Institute for Behavioral
Research, Inc., etc., et al.,

Appellees,

and

James V. Stunkard, D.V.M.,

Defendant.

Appeal from the United States
District Court for the District of
Maryland, at Baltimore.
John R. Hargove, [sic] District Judge

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Widener and Judge Ervin.

For the Court,

/s/ John M. Greacen
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

International Primate Protection League, et al.,	*	
Plaintiffs	*	CIVIL ACTION
v.	*	NO. HAR 81-3246
Institute for Behavioral Research, et al.	*	
Defendants	*	

O R D E R

After a careful review and consideration of the complete record in the above-entitled case including the Motion For Order Altering Or Amending Judgment, And For Order Reconsidering And Setting Order Of Dismissal Aside, And For Other Relief, With Request For Hearing filed by Plaintiffs on April 19, 1985, and the memoranda in support of and in opposition thereto, without a hearing pursuant to Local Rule 6, it is this 19th day of

November, 1985, by the United States District Court for the District of Maryland, hereby ORDERED:

1. that the Motion For Order Altering Or Amending Judgment And For Order Reconsidering And Setting Order Of Dismissal Aside, And For Other Relief, With Request For Hearing, is hereby DENIED;

2. that the Clerk of the Court shall mail copies of this Order to counsel for all parties.

/s/
John R. Hargrove
United States District Judge

IN THE CIRCUIT COURT FOR

MONTGOMERY COUNTY, MARYLAND

Sitting in Equity

INTERNATIONAL PRIMATE PROTECTION LEAGUE, a non-profit corporation Headquarters Summerville, South Carolina 29483	)	
and	)	Filed 12/3/81
ANIMAL LAW ENFORCEMENT ASSOCIATION, a corporation c/o Jo Shoesmith 14120 Whispering Pines Court Silver Spring, Maryland 20906	)	

and	)	
	)	
PEOPLE FOR ETHICAL	)	
TREATMENT OF ANIMALS,	)	
INC., a corporation	)	
209 Spring Avenue	)	
Takoma Park, Maryland	)	
20912	)	
	)	
and	)	
	)	
ALEX HERSHAFT	)	Equity No.
10005 Clue Drive	)	77895
Bethesda, Maryland	)	
20834	)	
	)	
and	)	
	)	
PAMELA CHAPMAN	)	R.3
3507A Hutch Place	)	
Chevy Chase, Maryland	)	
20815	)	
	)	

and	)	[Complaint in
	)	HAR-81-3246,
JO SHOESMITH	)	U.S. District
14120 Whispering Pines	)	Court for the
Court, #32	)	District of
Silver Spring, Maryland	)	Maryland,
20906	)	Appended to
	)	Petition for
and	)	Removal and
	)	Filed with it
VIRGINIA BOURQUARDEZ	)	as Complaint,
2913 Woodstock Avenue	)	12/17/81]
Silver Spring, Maryland	)	
20910	)	
	)	
and	)	
	)	
PETER W. SOLEM, Esq.	)	
and BERTHA K. SOLEM	)	
5714 Wilson Lane	)	
Bethesda, Maryland 20834	)	
	)	

and)

)

SHERRYL R. THOMAS)

7411 Glenside Drive)

Takoma Park, Maryland)

20912)

)

for themselves and the)

class,)

)

Plaintiffs)

)

v.)

)

INSTITUTE FOR BEHAVIORAL)

RESEARCH, INC.,)

a corporation, or its)

successors in interest)

and as agents and)

officers)

2429 Linden Lane)
Silver Spring, Maryland)
20910)
)
or, c/o)
)
ANIMAL LABORATORY)
9162 Brookville Road)
Silver Spring, Maryland)
20910)
)
* * *)
)
and)
)
RICHARD W. SWAIN, JR.)
Sergeant, Montgomery)
County Police)
801 Sligo Avenue)
Silver Spring, Maryland)
* * *)
)

and)

)

JAMES V. STUNKARD, D.V.M)

3428 Crain Highway)

Bowie, Maryland)

)

* * *)

)

and)

)

NATIONAL INSTITUTES OF)

HEALTH, ANIMAL LABORA-)

TORY)

Poolesville, Maryland,)

a branch of the PUBLIC)

HEALTH SERVICE, DEPART-)

MENT OF HEALTH AND HUMAN)

SERVICES, c/o Officer)

in Charge)

Poolesville Facility)

Poolesville, Maryland)

)

* * *)

)

and their successors,)

)

Defendants.)

BILL OF COMPLAINT AND PETITION FOR EX PARTE, PRELIMINARY OR INTERLOCUTORY, AND FINAL OR PERMANENT INJUNCTION: FOR DECLARATORY RELIEF; OR APPOINTMENT OF SPECIAL CUSTODIANS OR GUARDIANS; AND FOR OTHER RELIEF

The plaintiffs herein, individually and for their own members and for the classes and subjects hereafter named, do, by and through their counsel, Edward L. Genn, aver as follows:

1. The plaintiffs, hereafter more particularly described, bring this action on behalf of their own and class

interests and as next friends of seventeen (17) non-human primates seized pursuant to warrants executed on or about September 11, 1981 in this County. The said seizure took place at a facility of the defendant Institute for Behavioral Research, Inc., sometimes called "Behavioral Biology Center" (and hereafter called "Behavioral").

2. The seizure of the primates was effected by defendant Swain, a member of the Montgomery County Police Department who remains their custodian.*/ They

*/ Incorporated as Exhibit A is a copy of the actual warrant and supporting affidavit by Sergeant Swain, along with its attachments, and a return of what was seized, all of which are averred to be true on the basis stated. Because of its summary of pertinent fact, defendant Swain's affidavit appears in full in a later paragraph.

NOTE: To avoid excessive material, and because the exhibits are identified by content, they are excluded from this appendix.

presently reside at the Poolesville, Maryland facility for the National Institute of Health (NIH), a branch of the Public Health Service (PHS), which is in turn an agency of the defendant Department of Health and Human Resources (HHS).

3. The defendant Stunkard, a veterinarian in Prince Georges County, was recommended by defendant Behavioral in certain other proceedings hereafter described as a monitor of certain primate care, and has recommendatory and custodian functions in connection with the said non-human primates.

4. The criminal proceedings which arose from that seizure resulted in a trial of a principal of Behavioral, Edward Taub, in the District Court for Montgomery County, which lasted about a week, resulted in the filing of exten-

sive memoranda, and concluded with a finding of his guilt on 6 of 17 counts on November 23, 1981. Defendant Taub has since filed an appeal. Pertinent documents filed in that proceeding are appended.*/

5. The plaintiffs herein include individuals and members having a personal interest in the preservation and encouragement of civilized and humane treatment of animals, whose own aesthetic, conservational, and environmental interests are specifically and particularly offended and affected by

*/ The information in that case, No. 11848-81 in the District Court for Montgomery Maryland is attached as Exhibit B. It is actually against the principal of defendant Behavioral, Edward Taub. A memorandum in aid of argument submitted by the State, attached as Exhibit C, details the facts it presented to meet its burdens of proof and the theory, each pertinent to the matters herein asserted. The appeal filed by the said Taub is attached as Exhibit D.

the matters hereinafter described, and which interests, along with their educational interests, will be detrimentally impacted upon if the relief sought is not granted.

6. The plaintiffs further assert an interest on behalf of the seventeen (17) primates which are the subject of this action. While there are other criminal proceedings which arose from the aforesaid seizure resulting in a conviction on certain counts; and while there were related "return" proceedings, hereafter noted, brought under Article 27, Section 551(c) of the Maryland Code (providing for the return of property seized under a warrant); while these criminal proceedings have taken place, there is no accessible or practicable forum for full relief, nor to assert the interests of the said primates in not

being cruelly treated except through the equity, injunctive and declaratory powers of this Court in a proceeding of this kind. Among other reasons for this, is the lack of full forfeiture provisions under the State's animal cruelty criminal laws, and the burdens of proof in those proceedings (beyond a reasonable doubt) which are different and inappropriate to the interests here asserted by the plaintiffs; the Section 551(c) proceeding is criminal in nature, circumscribed in jurisdiction and scope or purpose, either in fact or in application as hereafter asserted; and neither provide the necessary declaratory or injunctive relief or scope for full consideration of the interests asserted for reasons more particularly set forth hereafter. Furthermore, because criminal proceedings arise after

the wrong, while civil proceedings such as this may deal with imminent, irreparable wrongs as those alleged herein, there is no fully adequate available forum beyond general equity powers.

7. The said primates will have inflicted on them unnecessary cruelty or death unless the relief here sought is granted. For the reasons stated, there is no other effective remedy or proceeding to consider or grant the immediate and full relief necessary to avoid this result; nor any person or entity to do so except these plaintiffs, or those similarly situated and affected, who might maintain an action to protect and provide or the current and future safety, health and lives of the said primates or the avoidance of further

unnecessary cruelties to them.*/

9. The plaintiffs consist of the following:

(a) The International Primate Protection League, a non-profit corporation, founded in 1973. It is the primary international organization dealing with the preservation and well-being of primates, whose members and board include recognized authorities and experts in the field. Beside its headquarters in this country, it also has a special office at the Regent Arcade House in London, England. It has Field Representatives in 20 countries, in particular: Australia, Bangladesh, Brazil, Canada, Ghana, Hong Kong, India, Japan, Kenya, Netherlands, Pakistan,

---

*/ In fact, while the action began as one affecting 17 non-human primates, at the point hereafter noted, one died while defendant Stunkard was in charge of his care. That primate was called "Charlie".

Singapore, South Africa, Southwest Africa, Taiwan, Tanzania, Thailand, the United Kingdom, Vietnam, and Zimbabwe. In its description of its activities, the League, after observing that many of its officers "have lived for long periods with primates in their natural habitats," then asserts these true facts:

> Primates are disappearing at an alarming rate. Every primate species is listed on the appendices of the Convention on International Trade in Endangered Species. All apes (gorillas, orangutans, chimpanzees, and gibbons), and all lemurs appear on Appendix I, the list reserved for the most endangered species, as do many monkeys.
>
> In countries where primates live, IPPL's Field Representatives work to create and preserve national parks and sanctuaries, and for the strict regulation of primate hunting, trapping, and sale.
>
> IPPL's educational efforts have contributed to decisions by many countries to ban or restrict primate trade and establish programs to protect primate habitat.

IPPL has raised funds to help set up antipoaching patrols in Rwanda, where the world's 200 remaining Mountain gorillas are desparately struggling to survive a serious outbreak of poaching. IPPL also helps support a Chimpanzee Rehabilitation project in the Gambia, West Africa, where once-captive chimpanzees are taught to live in the wild.

One of IPPL's accomplishments was its thorough documentation of the Singapore primate blackmarket, which was achieved through studies of import records of several countries and infiltration of animal traders. IPPL's efforts to convince Singapore authorities to curtain this traffic were successful. IPPL also exposed a ring which was sumuggling gibbons from Thailand to the United States and other Western countries, and was able to force the cancellation of orders for hundreds more gibbons.

In the importing countries, IPPL works to monitor all primate trade and has discovered numerous illegalities which it has drawn to the attention or relevant authorities. Members also monitor the conditions of zoo and laboratory primates in their localities." (PPL Brochure)

The said league, and the members for whom it acts, also assert a special educational, conservational and recreational interest in the preservation and safety of primates, the primates in this cause included; and also assert those interests in the instant primates as to any acts that offend or deny those special concerns.

(b) The Animal Law Enforcement Association is a corporation formed in August of this year to pursue non-profit goals related to effective enforcement and improvement of animal cruelty laws and procedures in this State. Its chief members are humane officers given specific powers under the statutes of this State, Article 27, Section 59, et seq. to seize cruelly treated animals and cause the arrest of those

responsible.*/ In addition to the same interests of all plaintiffs, this particular plaintiff and its members are directly affected because of uncertainties concerning any events or conditions relating to the primates' return to Behavioral, a return that is imminent. That return is likely to occur for all or some of the primates because of the inadequacies of remedy in the criminal laws, or for lack of state personnel, funding or time, or because of the absence of any full forfeiture procedures beyond the limited areas arising from a "conviction", or because of inadequate monitoring. Since its

*/ Attached hereto as Exhibit F is the entire act for ready reference and because of its relevance to the issues and allegations that follow. The powers of arrest are in Section 63, the definition of cruelty is in Section 62, the post-conviction powers are in Section 67, which also relates to the circumstances under which humane officers may act and is therefore relevant here.

humane officers are charged to enforce these laws, they are in doubt as to what future actions they may take in the circumstances without subjecting themselves to charges of violating the law. That interest is in addition to the like special interests they hold in common with the other plaintiffs.

(c) People for the Ethical Treatment of Animals, Inc. (hereafter called PETA), a recently formed corporation, acts in this state and elsewhere to carry out the purposes above described. It has promoted the protection of animals through public education and the dissemination of information regarding animal abuse and what the public can do to control such abuse, with a focus on animals used in the production of food and animals used in experimentation. In October, 1981, PETA, by Congressional

request, presented testimony on the treatment of animals in research laboratories before the House Subcommittee on Science, Research and Technology. In addition, it has provided special care and treatment and the funds therefor related to the very primates which are the subject of this action. As such, it has submitted a claim in the nature of a lien in the related criminal proceeding (the Section 551 hearing), the status of which is unresolved and likely to remain finally unresolved beyond the time for effective relief in this proceeding.*/

(d) The remaining individual plaintiffs set forth in the caption are all residents and taxpayers in the country, asserting the same and similar

---

*/ The claim arises from funds expended by PETA exceeding $6,000 for the care of these primates in circumstances later described.

interests as the other plaintiffs as well as their federal and state taxpayer status that affords an additional interest. On the bases stated herein these plaintiffs aver that the substantial expenditure of public funds in prosecution or post-conviction proceedings, inadequate to full relief, would not be necessary if the declaratory and general relief here sought were granted.

10. Critical facts pertinent to the plaintiff's claims and interests have recently surfaced, particularly a document called "Report and Recommendations of the NIH Committee To Investigate Alleged Animal Care Violations at the Institute for Behavioral Research." That intensive review with some of its pertinent exhibits and covering material hereafter called the "NIH Report", is attached as Exhibit E. It was issued

October 8, 1981 and disseminated the following day.*/ It resulted in the immediate suspension of an NIH grant to defendant Behavioral. It has not been considered in the said criminal proceedings for reasons more fully appearing hereafter.

11. In addition to the particular interests stated by the various plaintiffs, each of them (for themselves, their members and for those who are in the class) also aver that the activities complained of, which have occurred at the defendant Behavioral's premises and will occur if relief sought is not granted, have directly impaired the carrying-out of their special concern for practices of humane treatment for

*/ The NIH report is actually dated October 5. Exhibit E attached includes a forwarding letter to defendant Behavioral.

animals in the state; and it has impaired their special efforts to assure that humane treatment, their educational interests in those activities, and their enjoyment and pursuit of those interests.

12. The non-human primates involved are among the most advanced non-humans, more closely akin in their "human" needs and characteristics than animal species generally. It is well established that they are particularly sensitive to psychological stress because of their nature, capabilities and culture, a factor not addressed in criminal proceedings.*/

*/ For general description of macaque monkeys, the specific category here involved, see Attenborough, Life on Earth, Collins Publ. 1979 Ed., p. 278-281. See also Wilson, Sociobiology, Belknap Press of Harv. Press, 1978 Ed., pp. 170-171, 120; D. Morris, Primate Ethology, 3-5, 178-179, 186-187,

FOOTNOTE CONTINUED --

13. Background Facts. The primates here involved arose from purchases for certain alleged research evidently to be undertaken only if the funds were provided by the federal government. The original "Grant Application" made on June 30, 1979 in the sum of Three Hundred One Thousand Five Hundred Twenty-two Dollars ($301,522) for the period from April 1, 1980 through March 31, 1983 or slightly under One Hundred Thousand Dollars ($100,000) per year,

FOOTNOTE CONTINUED --

219-222; A. Eudey, Ethical Concerns in Primate Use and Husbandry, 2 International Journal for the Study of Animal Problems, No. 2, Mar/April 1981 Ed., pp. 96-102; McGrew, Social and Cognitive Capabilities of Non-Human Primates: Lessons from Wild to Captivity, 2 International Journal for the Study of Animal Problems, No. 3, May-June 1981, pp. 138-149. The affidavits hereafter referred to make this point. Even Behavioral, in other grant papers, referred to this point as an alleged justification for its actions, e.g., Exh. H, p. 4.

reflected that annually "supplies" would consist of, among other things, "six (6) monkeys (at) $200 (Two Hundred Dollars) each" (p.3) and maintenance of "30 monkeys at 55 cents per day." It included a charge to the government, if approved, of at least $400 a year for veterinary services (p. 3). Pertinent parts of the opening section of the grant application are attached as Exhibit G. It was to be directed to the effects of a certain kind of "deafferentation" in non-human primates.*/

At this same time, Behavioral also appears to have applied for another grant that repeated an earlier submis-

*/ In general, deafferentation is a procedure that is not directed at the brain (which in these subjects is large) but at spinal nerves which transmit sensation from limbs to brain. The nerves are cut or "deafferented" in the young fetal or newborn monkeys allegedly to observe how that affects their movements later.

sion dealing with fetal primates. As to that project, evidently concerned that the alleged research appeared to be unlikely to provide anything worthwhile, or at least was generaly of doubtful value and unnecessarily expensive or available through other animal models, the NIH "Review Group" issued a summary statement in December 1979, in which 16 members noted disapproval and 5 were for approval. That opinion suggests that the results were obvious (e.g. sprouting after lesions) and had been found in numerous prior experiments. The summary of that disapproval, fully attached as Exhibit H, reflects that:

> CRITIQUE (MAJORITY): This renewal proposal is a change from the previously funded grant, which involved a study of the extent of motor activity which survives dorsal root rhizotomy in both pre and neo-natal animals.

> It is a resubmission of a previously approved, but non-funded, renewal proposal.
>
> A major concern of previous reviewers was that the survival rate of the prenatally operated animals was so low (10-20%) that the considerable expense in funds and loss of animal life associated with the project did not justify its potential goals. . . . [balance omitted]

14. Notwithstanding this, Behavioral was able to persuade NIH to approve the separate deafferentation grant here involved. While it is not essential to this claim, still, to the extent that the rejected project may reflect a pattern in Behavioral to seek projects directed to the obvious or that which is not worthwhile, and for the purpose of funding, then they are pertinent facts. Further, in the instant case, to the extent that the representations in this grant about

treatment or death are not accurate, they are also pertinent. . . .*/

15. Following the ultimate receipt of the grant, the work at Behavioral began. The immediate events which led to the criminal charges against Behavioral are reflected in the affidavit of defendant, and one of the two current custodians of the primates

*/ Plaintiffs do underscore that in their grant request for funds relating to personnel, and supplies, Behavioral expressly represented (Exhibit G, p.): "Maintenance of deafferented animals involves considerable nursing care; it is arduous and time consuming. Many of these animals if left to themselves, would rapidly bite off their anesthetic limbs if these were not protected in a variety of ways and bandaged one or more times each day. The extra care that deafferented animals require also affects the cost of supplies and daily maintenance." (Emphasis added) That alleged self-imposed standard and representation by Behavioral was not only wholly unfulfilled, but it is likely to continue to be so. Behavioral has not and did not meet and will not meet minimal standards for experiments not involving deafferentation.

Sergeant Richard Swain. They arose from information supplied by Alex Pacheco, a prime mover in the plaintiff non-profit corporation, People for the Ethical Treatment of Animals ("PETA"). That affidavit, which is reflective of what was in part produced in the criminal case is set forth in full hereafter because it reflects the reported facts: It reads:

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR AN ARREST WARRANT

> Comes now your affiant, Sergeant Richard W. Swain, Jr., Montgomery County Department of Police, assigned to the Silver Spring Investigative Section, making an Affidavit in support of an application for an arrest warrant.
>
> 1. That on the 8th day of September, 1981, at 2000 hours, Sgt. Richard W. Swain, Jr. received information from Alex Pacheco that the Institute for Behavioral Research, Inc., through various individuals, was

inflicting unnecessary suffering upon non-human primates at the premises captioned above and presently is unnecessarily failing to provide these monkeys with nutritious food in sufficient quantity, necessary veterinary care, proper drink, air, space and shelter.

2. Mr. Pacheco is the chairperson for People for the Ethical Treatment of Animals, Inc., an animal protection organization designed to promote the rights and protection of animals. Alex Pacheco was born on August 19, 1958 in Joliet, Illinois. Alex Pacheco is a third year undergraduate student at George Washington Unversity, majoring in Environmental Studies. He is founder and Director of People for the Ethical Treatment of Animals, Inc., an animal rights and protection organization based in Washington, D.C. Alex Pacheco has worked on projects funded by the Fund for Animals, Friends of Animals and the Ohio Capital Area Humane Society over the past five years. He has done field research on humpback whales in Alaska for the Department of Fish and Wildlife, Alaska government, and has worked on a Fund for Animals marine mammal protection vessel in the Atlantic Ocean. Alex Pacheco is also founder of the Ohio Animal Rights Committee

in Columbus, Ohio. He has toured or done photographic studies of five other laboratories. Mr. Pacheco advised Sgt. Richard W. Swain, Jr. on the 8th day of September, 1981 that during the week of May 11, 1981, he offered to do volunteer work at the premises. Specifically, he stated that he made application for employment with Dr. Edward Taub, Principal Investigator of the Institute for Behavioral Research, Inc. Mr. Pacheco advised that at that time Dr. Taub had no current positions available but, that in conjunction with Ms. Georgette Yakalis, he was conducting experimentation on the premises to determine the effect on learning of primates who have had portions of their spinal nerves surgically severed. Mr. Pacheco advised Sgt. Swain that the technical name of this procedure is "Somatosensory Deafferentation". Mr. Pacheco stated to Sgt. Swain that both Dr. Taub and Ms. Yakalis accepted Mr. Pacheco's offer to do volunteer work in these experimentations at the premises. From the week of May 11, 1981 until September 6, 1981, Mr. Pacheco stated that he has been in the premises on a regular basis and has personal knowledge of all of the facts alleged herein. Mr. Pacheco was given the keys to the prelimes [sic] and both Dr. Taub and Ms. Yakalis

gave him permission to enter the premises at any time in order to conduct volunteer research on the primates. In addition, Mr. Pacheco was given carte blanche authority to enter the premises in order to observe the primates at any time.

3. Mr. Pacheco advised Sgt. Swain on the 8th day of September, 1981, that he has entered the premises since the week of May 11, 1981 to the present on at least forty (40) occasions. . . .

* * *

6. On the 8th day of September, 1981, Mr. Pacheco advised that he has personally consulted with eminent experts in the area of animal behavior, veterinary medical science, zoology, primatology, psychology, and anatomy. He advises further, on the 8th day of September, 1981, that these experts have recently entered the premises in question and made observations, which are recorded in their respective Affidavits, copies of which are attached hereto and incorporated herein. . . .

[balance omitted]

16. Based on that affidavit, seizure of the primates, which are the subject of this action, took place on September 11, 1981 at Behavioral's Brookville Road facility.

17. At that time, the nature of the primates' needs was such that no knowledgeable personnel or facilities were available to the State. Arrangements were therefore made with two uncompensated humane officers, Jean Goldenberg and Ingrid Newkirk to find, obtain, and effect "humane and proper care including necessary veterinary care" for the primates, a fact reflected in a document executed by them at the time, and attached as Exhibit I. The said Newkirk and Goldenberg are also members of one plaintiff, Animal Law Enforcement Association.

18. Following that seizure, a

variety of experienced groups and persons, including certain of the plaintiffs provided that care, treatment and shelter. A portion of a home on Beall Avenue in Rockville was specifically altered for the purpose, caretaking and professional personnel provided, and considerable expense incurred in the humane maintenance of the primates, which is both a State and Behavioral obligation. The total sums expended exceed Ten Thousand Dollars ($10,000.00), exclusive of necessary attorneys fees, and the time of the said Newkirk or Goldenberg and many others.

19. Behavioral itself thereafter instituted a proceeding under Article 27, Section 551(c) on the criminal side of this court. The cause was styled State of Maryland v. Premises known as Biology Center of the Institute for

Behavioral Research, Inc., Misc. Pet. No. 5821. It sought the primates' return under that section as items seized under a warrant. Various proceedings took place in the cause, but none resolved on the merits the critical elements that are presented herein. Viewing the cause as solely a "state" proceeding limited to the terms of Section 551(c), the court initially rejected direct full intervention by the first proposed intervenor, the Animal Law Enforcement Association, a plaintiff here. It did grant it "amicus" standing recognizing thereby its interest in the proceeding.

* * *

(App. 35)

23. The foregoing report is not the only document which arose subsequent to consideration on the merits by the Court

in the entry of its Order of October 9. In late September, certain professionals, particularly Dr. Geza Teleki and Dr. Michael Fox, made a physical investigation of the premises and provided affidavits setting forth what they observed at the premises on those occasions. Those reports were not considered on the merits of the prior orders, and appear to be confirmatory of what was found by NIH authorities. They were also not considered in the criminal case in the District Court, heard by the Honorable Stanley Klavan, and, in fact, no pending action arising from the criminal case whether directly in the District Court or in the Section 551(c) hearing in this Court, has fully considered the full redress appropriate, nor are they likely to do so because of the nature and results of those proceed-

ings. They are attached as Exhibits L and M (Dr. Fox) and N (Dr. Teleki). In the prior exhibits are further affidavits from other experts that show the prior conditions. The criminal cause, as noted, was against the principal Edward Taub and an Assistant John Kunz (acquitted on grounds he acted at the direction of Dr. Taub). About three weeks after the trial concluded, the Court heard oral argument and entered its judgment. It rendered its finding of guilt beyond a reasonable doubt on six of the seventeen counts, based on inadequate veterinary care as to the primates nown as Nero (Count A), Big Boy (B), Paul (D), Domition (E), Titus (I), and Billy (K). It directed a fine of Five Hundred Dollars ($500.00) on each count, deferring payment pending the de novo appeal. Thus far, it has indicated

an inclination to apply its "removal" authority on conviction under Article 27, §67, only to the six counts pertinent to the six primates who required that care, on the theory that under the statute as read, the absence of proper veterinary care would apply only to those animals in actual need of specific care rather than the general need for care by all seventeen. The indication is that if it had applied the latter theory, it would have found guilt as to all seventeen counts for the seventeen primates. It has also indicated that if adequate veterinary care is provided or apparent, it will not withhold return of the directly affected primates. In view of the manner in which the charges were [24] made and the admissible evidence, it did not find beyond a reasonable doubt there was unnecessary cruelty, nor did it

find, beyond a reasonable doubt the charges relating to the inadequate facilities, food and the like, were established by that standard.*/ During that trial, as noted, some efforts were made to present the NIH's report, but for evidentiary reasons, not applicable herein or to this Bill, pertinent parts were not received in evidence. Furthermore, factors surrounding the Section 551(c) hearing and subsequent events following the arrest were also note presented at the trial. As reflected in the "superseding" order in the Section 551(c) hearings (Ex.J),

*/ It appears, for example, that the undenied testimony of filth and extreme lack of sanitation may have been rejected as insufficient to establish an offense, solely because the District Court viewed the absence of words involving sanitation in the statute as eliminating that element from consideration. That is not the case in an equity action.

the retention of the primates at the NIH facility is to terminate at the conclusion of the prosecution. Plaintiffs are informed there is an immediate probability that the primates' return will take place without adequate time to avoid it, that the District Court may simply set conditions to return of the primates, either all of them, or for those 11, allegedly not directly requiring veterinary care; and that therefore the criminal proceedings will terminate with the rights of plaintiffs lost.

* * *

[balance of Complaint omitted]

PLAINTFFS' ANSWER TO PETITION FOR REMOVAL

For their answer to the Petition for Removal, plaintiffs aver as follows:

1. Since the state-filed action speaks for itself, any characterization of it that is inconsistent with its terms and the relief it seeks is denied.

2. The contract referred to in the Petition may relate more to a matter of defense than the direct suit. However, since that aspect of the petition is unclear, the practical resolution is not delay and litigation over such preliminary quesions, but rather a swift resolution of the primary issues. Accordingly, these plaintiffs will not oppose removal on condition the full cause and their full claims, state and federal, are heard herein; and on condition that this action will not work a substantial delay or avoidance of

those claims and their resolution. Removal should not be permitted to result in substantial multiplicity of actions, ... In this regard and in this cause, it appears that the same facts will be elicited for, or are necesary to, both federal and "state" issues. Under its powers, this Court can and should hear both aspects. Therefore, if the order of this Court preserves the rights of the parties in that manner (to all state and federal claims or defenses) as it should, plaintiffs will consent to an appropriate order doing so. Any other order would be objected to as an undue delay, bifurcation and inappropriate use of the removal statutes.

Edward L. Genn
Attorney for Plaintiffs
9 North Adams Street
Rockville, Maryland 20850
424-8400 or (202) 638-2027

IBR
Institutes for Behavior Resources, Inc.

September 24, 1985

Dr. William F. Raub
Associate Director
Office of Extramural Research & Training
National Institutes of Health
9000 Rockville Pike
Building 1, Room 107
Bethesda, Maryland 20205

Dear Dr. Raub:

At a recent meeting of the Board of Trustees of the Institutes for Behavior Resources, Inc., it was resolved that IBR relinquish ownership to NIH of the fifteen primates presently under NIH care.

The trustees took this action because the primates do not fit into the present IBR program. The Trustees objective is to relinquish ownership of the primates without publicity.

We have recently been informed by Dr. Edward Taub that although the application to complete his research was favorably reviewed, the priority rating in peer review renders the probability of funding remote. Consequently, in the absence of such funding, Dr. Taub will not continue to pursue this research effort, and will not require further use of the primates.

It, therefore, appears that NIH is the sole entity in a position to determine what use or disposition of the primates should be made in public interest.

Accordingly, IBR, as sponsor of the research project, releases to NIH any and all rights which it may have to the

fifteen primates now under NIH care.

Sincerely yours,

Joseph Vasapoli
Chief Executive Officer

UNITED STATES CONSTITUTION

ARTICLE III.

Section 1.

(Judicial Power, Tenure of Office)

The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

UNITED STATES CONSTITUTION

[Amendment V]

No person shall be . . . deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

[Amendment XIV]

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

45 C.F.R. § 74.113(a) Violation of terms.

(a) When a grantee has materially failed to comply with the terms of a grant, the granting agency may suspend the grant, in accordance with § 74.114, terminate the grant for cause, as provided in § 74.115, or take such other remedies as may be legally available and appropriate in the circumstances. [emphasis added]

28 U.S.C., § 636. Jurisdiction, powers and temporary assignment

. . . (b)(1) Notwithstanding any provisions of law to the contrary --

(A) A judge may designate a magistrate to hear and determine any pretrial matter pending before the

court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this paragraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

Title 28. Judiciary and Judicial Procedure. Part IV -- Jurisdiction and Venue -- Chapter 89, Actions Removable Generally, §1441.

* * *

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1447. Procedure after removal generally

. . . (c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall

remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Article 27. Crimes and Punishments,
Annotated Code of Maryland,
1982 Vol.

§ 63. Arrests by officers of humane society.

Any officer of any society or association incorporated for the prevention of cruelty to animals, duly incorporated under the laws of this State, shall upon his own view of any misdemeanor in relation to cruelty to

animals make arrests and bring before any commissioner or District Court offenders found violating the laws of this State in relation to cruelty to animals. In Baltimore County, the provisions of this section shall be enforced by the Baltimore County bureau of animal control. (An.Code, 1951, § 81; 1939, § 74; 1924, § 72; 1912, § 66; 1904, § 60; 1892, ch. 340, § 2; 1900, ch. 462; 1967, ch. 377; 1972, ch 181, § 28; 1978, ch. 647.)

Article 27. Crimes and Punishments, Annotated Code of Maryland, 1982 Vol.

§ 67, as amended, Care of Mistreated and Neglected Animals.

1985 CUMULATIVE SUPPLEMENT

CRUELTY TO ANIMALS

If the owner or custodian of an animal is convicted of any act of animal

cruelty, the judge may use his own discretion in ordering the removal of that animal or animals for their protection at the time of conviction. Whenever it becomes necessary, in order to protect any animal from neglect or cruelty, any officer or authorized agent of an animal humane society or any police officer or other public officials charged with the protection of animals may take possession of it, except that animals in the possession of medical and scientific research facilities may not be removed therefrom without the prior review and recommendation of the Department of Health and Mental Hygiene, Division of Veterinary Medicine. The Department of Health and Mental Hygiene shall conduct an investigation within 24 hours of the receipt of a complaint and shall, within 24 hours of the investiga-

tion, report to the State's Attorney of the county in which the facilities are situated. If an animal is impounded, yarded or confined and continues without necessary food, water or proper attention, or is cruelly treated or neglected, any officer or authorized agent of an animal humane society or any police officer or other public officials charged with the protection of animals may enter into and upon any place in which the animal is impounded, yarded or confined and supply it with necessary food, water and attention so long as it there remains, or, if necessary, for the health of the animals, may remove the animal, and not be liable to any action for that entry. In all cases the owner or custodian of that animal shall be notified of that action and any administrative remedies which may be

available by the person taking possession of the animal. The owner or custodian may file within ten days, if no administrative remedy is available, a petition for return of the animal in the District Court of the county in which the removal occurred. If the owner or custodian is notified and fails to file the petition within the time prescribed, or if the owner or custodian is unknown and cannot with reasonable effort be ascertained for a period of 20 days, the animal shall be held to be an estray and be dealt with as such, provided, however, that nothing in this section shall be construed as permitting the entry into a private dwelling or as permitting the taking of a farm animal without prior recommendation of a licensed veterinarian. In Baltimore County, the provisions of this section

shall be enforced by the Baltimore County government. (1955, ch. 278; 1963, ch. 718; 1964, ch. 151; 1972, ch. 181, § 28; 1975, ch. 716; 1976; ch. 803; 1977, ch. 291; 1978, ch. 647; 1984, ch. 528; 1985, ch. 482.)

Effect of amendments. -- The 1984 amendment, effective July 1, 1984, added the exception at the end of the second sentence and inserted the third sentence. The 1985 amendment, effective July 1, 1985, added "or by an organization approved by the Baltimore County government" at the end of the last sentence.

Article 27. Crimes and Punishments,
Annotated Code of Maryland,
1982 Vol.

§ 68. Expenses for food and attention given to mistreated or neglected animal.

The necessary expenses for food and attention given to an animal under § 67 of this article, may be collected from the owner thereof, and the animal shall not be exempt from levy and sale upon execution issued upon a judgment therefor. (1955, ch. 278.)

Federal Rule of Civil Procedure

Rule 56. Summary Judgment.

. . . (c) Motion and Proceeding Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits.

RULES OF U.S. DISTRICT COURT - MARYLAND

RULE 6

. . . (g) All motions shall be decided on the memoranda filed with the Clerk unless otherwise ordered by the Court. Where the motion has been decided on memoranda without a hearing, the Clerk will notify all parties of the decision.

Supreme Court, U.S.
FILED
FEB 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*,
Petitioners

v.

INSTITUTE FOR BEHAVIORAL RESEARCH, INC., *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT INSTITUTE FOR BEHAVIORAL RESEARCH, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDGAR H. BRENNER *
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6858
Attorney for Respondent Institute for Behavioral Research, Inc.

Of Counsel

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

February 4, 1987

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. When a case involving federal question issues, and pendent state law issues, is removed by the United States from state court to federal court, and, without objection by any party, is considered by the federal court, and the federal court concludes that the plaintiffs (petitioners* here and appellants below) do not have standing to raise the federal issues, is it error for an appellate court to direct dismissal of the pendent state law issues without deciding them?

2. Whether a group of private plaintiffs have standing to bring a lawsuit challenging a medical researcher's compliance with federal standards for the care of laboratory animals?

3. Whether the trial judge's *de novo* review of the magistrate's report and recommendations is subject to constitutional challenge; and whether a Ninth Circuit decision involving only a *consensual case reference* to a magistrate involves a conflict with the Fourth Circuit's resolution of this case which involves only a *mandatory case reference* to a magistrate?

---

* All of the petitioners, appellants and plaintiffs below, International Primate Protection League, *et al.*, are for clarity and simplicity sometimes hereinafter referred to as "Primate League."

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTES AND RULES INVOLVED	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. AFTER HOLDING THAT PETITIONERS DID NOT HAVE STANDING TO RAISE THE FEDERAL QUESTION ISSUES, THE COURT BELOW PROPERLY EXERCISED ITS DISCRETION TO DISMISS, AND NOT DECIDE, THE PENDENT STATE LAW ISSUES	3
II. THE COURT BELOW PROPERLY CONCLUDED THAT PRIVATE PARTIES DO NOT HAVE STANDING TO CHALLENGE A MEDICAL RESEARCHER'S COMPLIANCE WITH FEDERAL STANDARDS FOR THE CARE OF LABORATORY ANIMALS	6
III. THE TRIAL JUDGE'S *DE NOVO* REVIEW OF THE MAGISTRATE'S RECOMMENDED DECISION IS NOT SUBJECT TO CONSTITUTIONAL CHALLENGE; AND THERE IS NO CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE NINTH CIRCUIT WITH RESPECT TO THE FEDERAL MAGISTRATE'S ACT OF 1979	7
CONCLUSION	9
APPENDIX	
Petition for Removal, filed December 17, 1981	1a
Statutory appendix	6a

TABLE OF AUTHORITIES

Cases:	Page
American Fire & Cas. Ins. v. *Finn*, 341 U.S. 6 (1950)	5
Baker v. *Carr*, 369 U.S. 186 (1961)	6
Cook v. *Weber*, 698 F.2d 907 (7th Cir. 1983)	5
Fox v. *Curtis*, 712 F.2d 84 (4th Cir. 1983)	4
In re Romulus Community Schools, 729 F.2d 431 (6th Cir. 1984)	5
Pacemaker Diagnostic Clinic of America v. *Instromedix*, 725 F.2d 537 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1985)	8
Thomas v. *Arn*, 106 S. Ct. 466 (1985)	8
Torrence v. *Shedd*, 144 U.S. 527 (1892)	5
United Mine Workers of America v. *Gibbs*, 383 U.S. 715 (1965)	4, 5
United States v. *Raddatz*, 447 U.S. 667 (1980)	8
United States v. *Richardson*, 418 U.S. 166 (1974)	6
Statutes:	
The Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* (1982)	3, 7
The Federal Magistrate Act of 1979, 93 Stat. 643 (1979)	7, 8
28 U.S.C. § 636(b)(1) (1982)	8
28 U.S.C. § 636(b)(1)(B) (1982)	8
28 U.S.C. § 636(c)(1) (1982)	8
28 U.S.C. § 1441(a) (1982)	3, 4, 5
28 U.S.C. § 1441(c) (1982)	4, 5
Court Rules:	
Fed. R. Civ. P. 12(b)	8
Fed. R. Civ. P. 78	8
Local Rule 6(G) of the United States District Court for the District of Maryland	8
Other Authorities:	
C. Wright & A. Miller, 14A *Federal Practice and Procedure* § 3724 (1985 & Supp. 1986)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1155

INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*,
Petitioners

v.

INSTITUTE FOR BEHAVIORAL RESEARCH, INC., *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT INSTITUTE FOR BEHAVIORAL RESEARCH, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Institute for Behavioral Research, Inc., respectfully requests that the petition for writ of certiorari be denied.

STATUTES AND RULES INVOLVED

28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(c) (1982); 28 U.S.C. § 636(b)(1) (1982) and 28 U.S.C. § 636(c)(1) (1982) of The Federal Magistrate Act of 1979, 93 Stat. 643 (1979); Fed. R. Civ. P. 78; and Local Rule 6(G) of the United States District Court for the District of Maryland are reproduced in Appendix B.

COUNTERSTATEMENT OF THE CASE

Respondent, Institute for Behavioral Research, Inc. ("IBR"),[1] objects to petitioners' statement of the case and refers this Court to the succinct statement of the case appearing at the beginning of the opinion of the court below. *See* Pet. App. 5-17.[2]

---

[1] Respondent, Institute for Behavioral Research, Inc. ("IBR"), is a not-for-profit corporation incorporated under the laws of the District of Columbia. It has no parents, affiliates, subsidiaries, or shareholders. After the initiation of this litigation, its name was changed to Institutes for Behavior Resources, Inc.

[2] On August 10, 1983, when the Maryland Court of Appeals reversed the medical researcher's conviction on the last remaining of the original 17 counts, and directed that the information against him be dismissed, the previously entered Maryland court orders, relating to the custody of the primates, expired by their terms. Opinion 8, 10, Resp. App. 11, 16. All matters relating to the primates then became the sole concern of their owners, IBR and the National Institutes of Health ("NIH"), in whose custody they resided. NIH maintained the primates at their Poolesville, Maryland, animal facility.

After the United States District Court for the District of Maryland dismissed Primate League's Complaint, Primate League did not seek a stay, either in the District Court or in the Court of Appeals, and no stay was granted.

After submission of the case to the Court of Appeals on May 8, 1986, the primates were transferred by NIH from Poolesville, Maryland, to the Delta Primate Center in Covington, Louisiana. This transfer took place on or about June 23, 1986. Primate League apparently regarded the Delta Primate Center as unsuitable custodians and objected to the 90-day quarantine that was imposed upon the primates as newly arrived animals at the facility. In the Court of Appeals, Primate League sought, *inter alia*, a show cause order for return of the primates to Poolesville, Maryland, or a transfer of custody of the primates to their designee. The court below, having been advised that IBR, the owner of the primates, did not object to their transfer by NIH to the Delta Primate Center, denied the motion on September 3, 1986. The Opinion of the court below was handed down the following day, September 4, 1986.

Thereupon, appellants secured an extension of time to file a petition for "Rehearing and/or an Order Vacating, Withdrawing

REASONS FOR DENYING THE WRIT

I. AFTER HOLDING THAT PETITIONERS DID NOT HAVE STANDING TO RAISE THE FEDERAL QUESTION ISSUES, THE COURT BELOW PROPERLY EXERCISED ITS DISCRETION TO DISMISS, AND NOT DECIDE, THE PENDENT STATE LAW ISSUES

As the court below noted, the case involved federal question issues under the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*, and pendent state law issues. Opinion, Pet. App. 13, 33-34. The court held that petitioners did not have standing to raise the federal issues. Opinion, Pet. App. 17-33. Though the court below had authority to decide them, it properly declined to decide the pendent state law issues and directed their dismissal. The court had the option under 28 U.S.C. § 1441(a) of either dismissing the case or remanding the pendent state claims.

Neither Primate League nor respondent, Institute for Behavioral Research, Inc., opposed the removal by the United States pursuant to 28 U.S.C. § 1441(a) from the Circuit Court for Montgomery County, Maryland, to the United States District Court for the District of Maryland. Petition for Removal, Resp. App. A3.[3] Petitioners explained:

> "it appears that the same facts will be elicited for, or are necessary to, both federal and 'state' issues."

---

and Modifying Opinion, and Other Relief; With Suggestion for Rehearing *en banc*" until September 22, 1986. When the petition was filed, no member of the Court of Appeals for the Fourth Circuit found any merit in it. The Petition was denied on October 7, 1986. Pet. App. 61-62.

[3] Petitioners, by not opposing petition for removal, consented to the court's hearing the case and cannot be heard to complain that they are dissatisfied with the result. Petitioners purported to attach various conditions to the removal but such unilateral action by them clearly could not preclude the court from exercising its discretion with respect to the ultimate disposition of the case.

Plaintiffs' Answer to Petition for Removal, Pet. App. 106.

After the removal, the case was referred to a magistrate, who received and considered extensive briefs submitted on behalf of all parties dealing with the issue of Primate League's standing to maintain the action. The magistrate issued an 11-page Report and Recommendation, concluding that Primate League lacked standing both with respect to the federal issues and the pendent state law issues. Pet. App. 44-57. The magistrate's decision was reviewed *de novo* and approved by the United States District Court judge. Pet. App. 59-60. Primate League then filed an extensive motion for reconsideration. The motion for reconsideration was subsequently denied by the District Court judge. Pet. App. 63-64.

On appeal, after ruling that petitioners did not have standing with respect to the federal issues, the Court of Appeals recognized that it was entitled to decide the pendent state law issues, Opinion, Pet. App. 34, *citing United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1965), but found that "state claims should usually be dismissed if the federal claims have been dismissed before trial." *Id.*

The Primate League argues that 28 U.S.C. § 1441(c) required remand of the pendent state issues rather than dismissal. 28 U.S.C. § 1441(c), however, does not even apply. As the Fourth Circuit has previously explained, where the state and federal claims arose from a "common nucleus of operative fact" and thus were properly removable to federal court under 28 U.S.C. § 1441(a), the alternative of dismissal in lieu of remand "clearly exists." *Fox* v. *Curtis*, 712 F.2d 84, 89 n.4 (4th Cir. 1983); Petition for Removal, Resp. App. A3. The Court noted that 28 U.S.C. § 1441(c), which gives discretionary authority to remand "separate and independent claims" removable only because of their joinder with removable claims, was inapplicable. *Id.* The courts that

have considered the question have agreed that this Court's opinion in *Gibbs* controls where the action is removed pursuant to 28 U.S.C. § 1441(a), and that dismissal is appropriate regardless of whether remand is also appropriate. *See, e.g., In Re Romulus Community Schools*, 729 F.2d 431, 436 (6th Cir. 1984) ("[w]e believe, following *Gibbs*, that the district court would have been clearly justified in dismissing the case" which had been removed pursuant to § 1441(a)); *Cook* v. *Weber*, 698 F.2d 907, 909-10 (7th Cir. 1983) (the district court, following *Gibbs*, properly exercised its discretion in dismissing pendent state claims removed pursuant to § 1441(a)).[4]

The federal and state claims, as the Primate League itself has pointed out (Plaintiffs' Answer to Petition for Removal, Pet. App. 106), involve "the same facts and transactions" and thus "[i]t cannot be said that there are separate and independent claims for relief as § 1441 (c) requires." *American Fire & Cas. Ins.* v. *Finn*, 341 U.S. 6, 16 (1950). In particular, Section 1441(c) is inapplicable because the claims are not "independent" given that complete relief cannot be afforded in the absence of some of the parties. C. Wright & A. Miller, 14A *Federal Practice and Procedure*, § 3724, at 362 & n.17 (1985 & Supp. 1986) (and cases cited); *see, e.g., Torrence* v. *Shedd*, 144 U.S. 527, 530 (1892).

In dismissing the pendent state law issues, the Court of Appeals (*see* Opinion, Pet. App. 33-34) followed the clear direction of this Court in *Gibbs*, 383 U.S. at 726, in which this Court explained:

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in consideration of judicial economy, convenience and fairness to liti-

---

[4] The decisions relied upon by petitioners at page 55 of their petition do not address the propriety of dismissal, in lieu of remand, after removal pursuant to § 1441(a).

> gants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.*" (Emphasis supplied.)

Thus, the court's exercise of its discretion to dismiss, but not to decide, the pendent state law claims was an entirely proper disposition.

II. THE COURT BELOW CONCLUDED THAT PRIVATE PARTIES DO NOT HAVE STANDING TO CHALLENGE A MEDICAL RESEARCHER'S COMPLIANCE WITH FEDERAL STANDARDS FOR THE CARE OF LABORATORY ANIMALS

Relying on *United States* v. *Richardson*, 418 U.S. 166, 174-75 (1974), Opinion, Pet. App. 18, the court below correctly concluded that Primate League's status as a taxpayer did not vest it with standing to enforce animal care regulatory requirements. Opinion, Pet. App. 18. Similarly, the court concluded that Primate League's voluntary efforts with respect to the research animals did not give them "a personal stake in the outcome of the controversy" sufficient to establish standing. Opinion, Pet. App. 19, *quoting Baker* v. *Carr*, 369 U.S. 186, 204 (1961).

The court below was entirely correct in concluding that an analysis of the Animal Welfare Act makes it clear that Congress had not intended "lawsuits by private individuals as a complement to the authority of the Secretary of Agriculture." Opinion, Pet. App. 32. If Primate League were found to have standing to challenge a medical researcher's compliance with federal standards

concerning the care of laboratory animals, standing would then be available to virtually all students and laboratory technicians working on research projects involving the use of animals. If standing could be so easily acquired, and by so many people, it would become a meaningless requirement. In the words of the court below the finding of standing in such circumstances "might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering." Opinion, Pet. App. 6.

In reaching this conclusion, the court below justifiably relied on the *amicus curiae* brief submitted on behalf of 68 scientific and medical organizations. Opinion, Pet. App. 28. The court noted that *amici* predicted that "animal research will play some part in the prevention and treatment of such illnesses as multiple sclerosis, AIDS, and Alzheimer's disease." *Id.* at 29. The court's analysis of recent amendments to the Animal Welfare Act, in which there was a congressional finding that " 'the use of animals is instrumental in certain research, in education or for advancing knowledge of causes for treatments of diseases and injuries which affect both humans and animals' " led the court to conclude that the congressional goals could not be realized if private lawsuits interfering with vitally needed research were permitted. *Id.* (Citation omitted.)

III. THE TRIAL JUDGE'S *DE NOVO* REVIEW OF THE MAGISTRATE'S RECOMMENDED DECISION IS NOT SUBJECT TO CONSTITUTIONAL CHALLENGE; AND THERE IS NO CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE NINTH CIRCUIT WITH RESPECT TO THE FEDERAL MAGISTRATE'S ACT OF 1979

1. Petitioners appear to contend in their fourth question presented for review, Pet. iii, that District Court Trial Judge John R. Hargrove impermissibly delegated authority to the magistrate to make a Report and Rec-

ommendation on the Motion to Dismiss filed under Fed. R. Civ. P. 12(b). However, there is no merit to this argument. 28 U.S.C. § 636(b)(1)(B) (1982) specifically authorizes a district court judge to refer dispositive motions to a magistrate. In such cases, the statute provides that a "judge of the court shall make a *de novo* determination[5] of those portions of the report . . . or recommendations to which objection is made." This procedure, scrupulously followed in this case, Pet. App. 59-60, 63-64, has been specifically sanctioned by this Court in *United States* v. *Raddatz*, 447 U.S. 667, 674 (1980).[6]

2. Contrary to the assertions at page 64 of the Petition, there is no conflict involving the interpretation of the Federal Magistrate Act of 1979, 93 Stat. 643, between the Ninth Circuit decision in *Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d 537 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1985), and the decision of the Fourth Circuit in this case.

As noted above, this case involved a mandatory referral to a magistrate, under 28 U.S.C. § 636(b)(1), and a subsequent *de novo* determination of the magistrate's recommendation by a United States District Court judge. *See* Pet. App. 59-60, 63-64. The decision in *Pacemaker* did not involve a *mandatory* referral under 28 U.S.C. § 636(b)(1), but rather a *consensual* case reference by the parties to a magistrate under 28 U.S.C. § 636(c)(1), and thus *Pacemaker* could not involve a holding in conflict with the decision below.

---

[5] Making "a *de novo* determination" has been equated with making "a *de novo* review." *See Thomas* v. *Arn*, 106 S. Ct. 466, 474-75 (1985).

[6] As to the complaint that the case was heard without oral argument, implementing Fed. R. Civ. P. 78, Local Rule 6(G) of the United States District Court for the District of Maryland expressly provides in pertinent part that "[a]ll motions shall be decided on the memoranda filed with the Clerk unless otherwise ordered by the Court."

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EDGAR H. BRENNER *
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6858
Attorney for Respondent Institute for Behavioral Research, Inc.

Of Counsel

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

February 4, 1987

* Counsel of Record

APPENDICES

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 81-3246

INTERNATIONAL PRIMATE
PROTECTION LEAGUE, a non-
profit corporation
Headquarters
Summerville,
South Carolina 29483

and

ANIMAL LAW ENFORCEMENT
ASSOCIATION, a corporation
c/o Jo Shoesmith
14120 Whispering Pines Court
Silver Spring, Maryland 20906

and

PEOPLE FOR ETHICAL TREATMENT
OF ANIMALS, INC., a corporation
209 Spring Avenue
Takoma Park, Maryland 20912

and

ALEX HERSHAFT
10005 Clue Drive
Bethesda, Maryland 20834

and

PAMELA CHAPMAN
3507A Hutch Place
Chevy Chase, Maryland 20815

and

JO SHOESMITH
14120 Whispering Pines Court, #32
Silver Spring, Maryland 20906

and

VIRGINIA BOURQUARDEZ
2913 Woodstock Avenue
Silver Spring, Maryland 20910

and

PETER W. SOLEM, Esq.
and BERTHA K. SOLEM
5714 Wilson Lane
Bethesda, Maryland 20834

and

SHERRYL R. THOMAS
7411 Glenside Drive
Takoma Park, Maryland 20912

for themselves and the class,
Plaintiffs

v.

INSTITUTE FOR BEHAVIORAL
RESEARCH, INC., a corporation
or its successors in interest
and as agents and officers
2429 Linden Lane
Silver Spring, Maryland 20910
or, c/o
ANIMAL LABORATORY
9162 Brookville Road
Silver Spring, Maryland 20910
or, c/o
JAMES R. MILLER, Esq.
414 Hungerford Drive
Rockville, Maryland 20850

and

RICHARD W. SWAIN, JR.
Sergeant, Montgomery
County Police
801 Sligo Avenue
Silver Spring, Maryland
c/o State's Attorney's Office
Attn: Roger Galvin, Esq.
Rockville, Maryland 20850

and

JAMES V. STUNKARD, D.V.M.
3428 Crain Highway
Bowie, Maryland
and c/o JAMES R. MILLER, Esq.
414 Hungerford Drive
Rockville, Maryland 20850

and

NATIONAL INSTITUTES OF HEALTH,
ANIMAL LABORATORY
Poolesville, Maryland,
a branch of the PUBLIC HEALTH
SERVICE, DEPARTMENT OF HEALTH
AND HUMAN SERVICES
c/o Officer in Charge
Poolesville Facility
Poolesville, Maryland
and c/o Shelley Steuer,
Attorney Advisor
9000 Rockville Pike
Bethesda, Maryland 20205

and their successors,

Defendants

Filed December 17, 1981

R. 1

PETITION FOR REMOVAL

Your Petitioner, NATIONAL INSTITUTES OF HEALTH, an Agency of the United States of America, by its attorneys, J Frederick Motz, United States Attorney for the District of Maryland and Lynne A. Battaglia, Assistant United States Attorney for said District, respectfully states:

1. There is now pending in the Circuit Court for Montgomery County, Maryland, a civil action entitled International Primate Protection League, et al. v. Institute for Behavioral Research, Inc., et al., in which the National Institute of Health is one of the defendants. The Equity Number assigned to the suit in Montgomery County is 77895. According to the Motions to Shorten Time, for Show Cause Order, and with Request for Expedited Hearing on Motion for Preliminary Injunction filed therein, the National Institute of Health was served with the pleadings on Monday, December 7, 1981.

2. The United States District Court for the District of Maryland has original jurisdiction to consider this action under 28 U.S.C. Section 1346(a)(2) on the basis of an alleged contract with the United States, and the suit heretofore filed in the Circuit Court for Montgomery County is therefore removable under 28 U.S.C. Section 1441(a), which expressly grants original jurisdiction to the various United States District Courts to hear such actions.

3. This action may be removed without bond pursuant to 28 U.S.C. Section 1446 as it is a petition on behalf of the United States for removal of a civil action.

4. Attached to this Petition, pursuant to 28 U.S.C. Section 1446(a), are copies of all papers served upon the National Institute of Health with respect to this action.

WHEREFORE, your Petitioner respectfully requests that the captioned case now pending in the Circuit Court

for Montgomery County, Maryland, Equity No. 77895, be removed therefrom to the United States District Court for the District of Maryland.

Respectfully submitted,

J. Frederick Motz
United States Attorney

By: /s/ Lynne A. Battaglia
LYNNE A. BATTAGLIA
Assistant U.S. Attorney
101 W. Lombard Street
Baltimore, MD 21201-2692
(301) 539-2940

SUBSCRIBED AND SWORN TO before me this 17th day of December, 1981.

/s/ [Illegible]
Notary Public
My Commission Expires: 7/1/82

APPENDIX B

1. 28 U.S.C. § 1441. Actions Removable Generally

28 U.S.C. § 1441(a) (1982)

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(c) (1982)

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

2. The Federal Magistrate Act of 1979

28 U.S.C. § 636(b)(1) (1982)

(b)(1) Notwithstanding any provision of law to the contrary—

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to in-

voluntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636(c)(1) (1982)

(c) Notwithstanding any provisions of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

3. Fed. R. Civ. P. 78.

Rule 78. Motion Day

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

4. Local Rule 6(G) of the United States District Court for the District of Maryland

> (G) All motions shall be decided on the memoranda filed with the Clerk unless otherwise ordered by the Court. Where the motion has been decided on memoranda without a hearing, the Clerk will notify all parties of the decision.

Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1155

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL., PETITIONERS

v.

INSTITUTE FOR BEHAVIORAL RESEARCH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

Animal Lovers Volunteer Ass'n v. *Weinberger*, 765 F.2d 937 (9th Cir. 1985) 6
Animal Welfare Institute v. *Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), cert. denied, 434 U.S. 1013 (1978) 7
Benton Franklin Riverfront Trailway & Bridge Committee v. *Lewis*, 701 F.2d 784 (9th Cir. 1983) 7
Carnegie-Mellon University v. *Cohill*, cert. granted, No. 86-1021 (Feb. 23, 1987) 5
Cook v. *Weber*, 698 F.2d 907 (7th Cir. 1983) 5
Fox v. *Custis*, 712 F.2d 84 (4th Cir. 1983) 4
Naylor v. *Case & McGrath, Inc.*, 585 F2d 557 (2d Cir. 1978) 5
Pacemaker Diagnostic Clinic of America, Inc. v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.), cert. denied, 469 U.S. 824 (1984) 8
Pacific Legal Foundation v. *Goyan*, 664 F.2d 1221 (4th Cir. 1981) 7
Romulus Community School, In re, 729 F.2d 431 (6th Cir. 1984) 4-5
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 3, 6
Swett v. *Schenk*, 792 F.2d 1447 (9th Cir. 1986) 5
Taub v. *State*, 296 Md. 439, 463 A.2d 819 (1983) 2
Thomas v. *Arn*, No. 84-5630 (Dec. 4, 1985) 8
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 4, 5
United States v. *Richardson*, 418 U.S. 166 (1974) 3

Statutes:

Animal Welfare Act, 7 U.S.C. (& Supp. III) 2131 *et seq.* 4
28 U.S.C. 636(b) 8
28 U.S.C. 636(c) 8
28 U.S.C. 1441(a) 2
28 U.S.C. 1441(c) 5, 6
28 U.S.C. 1447(c) 5

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1155

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL., PETITIONERS

v.

INSTITUTE FOR BEHAVIORAL RESEARCH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners challenge the court of appeals' holding that they lack standing to prevent the return of certain monkeys to a laboratory that is conducting medical research pursuant to a grant from the National Institutes of Health.

1. Petitioners are certain individuals and organizations professing concern for the welfare of animals. In 1981, they complained to authorities of the State of Maryland that Dr. Edward Taub, a principal

of respondent Institute for Behavioral Research (IBR), was conducting medical experiments on and failing properly to care for certain monkeys. Pet. App. 7-10, 35-37. Those authorities then obtained a warrant to search IBR's laboratory and seized seventeen monkeys that they found there. Although Dr. Taub explained that his medical experiments were being funded by the National Institutes of Health (NIH), the Maryland authorities charged that he was violating the state's cruelty-to-animals statute by his treatment of the monkeys. *Id.* at 10-11. A Maryland court ordered that the monkeys be placed in custody pending Dr. Taub's prosecution (*id.* at 11).

2. Dr. Taub was subsequently acquitted of the criminal violations with which he was charged (Pet. App. 11).[1] Fearful that the custody order would therefore expire, petitioners commenced this civil action in the Circuit Court for Montgomery County, Maryland, seeking to prevent the monkeys from being returned to IBR (*id.* at 11-13). NIH promptly removed the case to the United States District Court for the District of Maryland, pursuant to 28 U.S.C. 1441(a), and, together with IBR, moved that the case be dismissed (Pet. App. 13). The district court assigned the case to a federal magistrate and, in January 1985, the magistrate determined that petitioners lacked standing to obtain the injunctive relief

---

[1] Dr. Taub was initially acquitted on eleven of seventeen counts (Pet. App. 11). On appeal, the Court of Appeals of Maryland overturned the six counts on which he had been convicted, holding that the Maryland cruelty-to-animals statute does not apply to institutions conducting medical research pursuant to federal medical research programs. See *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983).

that they requested (*id.* at 16; see also *id.* at 35-38). After conducting a "*de novo* review of the Magistrate's Report and Recommendation," the district court adopted the magistrate's report and dismissed the action (*id.* at 59-60).

3. The court of appeals unanimously affirmed (Pet. App. 1-34). It found that petitioners had not alleged sufficient injury-in-fact to give them " 'a personal stake in the outcome of the controversy' " (*id.* at 19 (citation omitted)). The court rejected petitioners' claim of "taxpayer standing," reasoning that *United States* v. *Richardson*, 418 U.S. 166 (1974), foreclosed their argument "that their tax payments entitle them to ensure that the law is respected by NIH, a federal agency, and by IBR, a recipient of federal funds" (Pet. App. 18). The court also rejected petitioners' argument that they had standing by virtue of the fact that "they contributed to the maintenance of the monkeys" while the monkeys were in custody, stating that petitioners' "voluntary offer to help the Maryland authorities" did not give them "any interest in the monkeys, who remained the property of IBR and in the legal custody of [the state authority]" (*id.* at 18-19). The court further held that *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), foreclosed petitioners' attempt to predicate standing on their "asserted commitment to the humane treatment of animals" (Pet. App. 19-21), finding that petitioners could not claim standing based on the disruption of "their personal relationship with these monkeys" since petitioners "ha[d] been with the monkeys primarily because of this litigation" and would no longer be entitled even to "see the monkeys in the IBR laboratory if the defendants satisfied all

requirements of care" (*id.* at 21, 22).[2] Finally, the court sustained the dismissal of petitioners' state law claims (*id.* at 33-34), holding that, under "the doctrine of pendent jurisdiction[,] * * * state claims should usually be dismissed if the federal claims have been dismissed before trial." "Without a justiciable case or controversy," the court held, "federal courts cannot address claims of state law." *Id.* at 34.

4. The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioners err in suggesting (Pet. 54-56) that the court below was obligated to direct the district court either to address the state law claims or to remand those claims to the state court. This Court has ruled that, when federal claims are dismissed before trial, pendent "state claims should be dismissed as well" (*United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted)). Moreover, the courts of appeals are unanimous in holding that pendent state claims need not be remanded to state courts where, as here, they arise out of the same core of facts as the federal claims that are dismissed. See *Fox* v *Custis*, 712 F.2d 84, 89 n.4 (4th Cir. 1983); *In re Romulus Community Schools*, 729 F.2d 431, 436 (6th Cir. 1984).[3]

---

[2] As an alternative holding, the court also ruled that, even if petitioners had standing, the federal statute from which they sought to infer a private right of action—the Animal Welfare Act, 7 U.S.C. (& Supp. III) 2131 *et seq.*—did not "authorize[] their right to seek relief" (Pet. App. 23). The court determined that the "statutory design * * * [is] inconsistent with the private right of action that [petitioners] assert" (*id.* at 24).

[3] Contrary to petitioners' assertion (Pet. 55), no court of appeals has held that state claims must be remanded when

Indeed, in *Carnegie-Mellon University* v. *Cohill*, cert. granted, No. 86-1021 (Feb. 23, 1987), this Court will determine whether a district court may *ever* remand pendent state law claims for a reason not set forth in 28 U.S.C. 1447(c). That Section provides that a district court "shall remand the case" to state court if it appears that the case was removed to federal court "improvidently and without jurisdiction." Petitioners do not and cannot claim that the removal of this case to federal court was improvident or without jurisdiction, since petitioners' complaint asserted federal law claims against NIH, a federal agency. See *Cook* v. *Weber*, 698 F.2d 907, 909 (7th Cir. 1983) (dismissal without prejudice of state claims is the *only* permissible remedy where the condition set forth in Section 1447(c) is not met). Therefore, petitioners' contention that the district court *must* remand a properly removed case to state court is completely unfounded.[4]

Finally, contrary to petitioners' assertion (Pet. 7), 28 U.S.C. 1441(c) does not require that their state law claims be remanded. That Section pertains

---

federal claims are dismissed before trial. The gravamen of *Naylor* v. *Case & McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978), and *Swett* v. *Schenk*, 792 F.2d 1447 (9th Cir. 1986), is that district courts *may* remand pendent state claims, not that they must do so.

[4] We note that this case need not be held pending the resolution of *Carnegie-Mellon University*. As noted in the text, that case concerns whether a court *may* remand a removed case to state court for reasons other than those set forth in 28 U.S.C. 1447(c). Here, by contrast, petitioners contend that a district court *must* remand a case to a state court whether 28 U.S.C. 1447(c) applies or not. This Court has already rejected that contention. See *United Mine Workers* v. *Gibbs*, 383 U.S. at 726 (instructing that pendent state claims be dismissed).

only to state law claims that are "separate and independent" from the federal claims that initially led to the removal. Petitioners' state law claims—which arose out of the same core set of facts as their federal claims—are not such "separate and independent" claims. And, in any event, Section 1441(c) simply *authorizes* a district court to remand such separate and independent state law claims; it does not *mandate* that the district court do so.

b. Petitioners likewise err in suggesting (Pet. 56-62) that, because they have had "specific contacts" with the monkeys at issue in this case, they have standing to invoke the jurisdiction of the district court in their effort to assert control over those animals. As the court below noted (Pet. App. 20-22), this Court has held that a mere abstract interest in the preservation of another person's property—even the government's property—does not provide a litigant with standing to sue in federal court. See *Sierra Club* v. *Morton*, 405 U.S. 727, 735 n.8 (1972). To be sure, the Court has intimated that, where an individual actually has a right of access to and visits a park or other public facility, he arguably may invoke a federal court's jurisdiction to challenge acts that disturb the facility's physical well-being (*ibid.*). But the monkeys are the property of IBR and, apart from the temporary change in custody attributable to the now-concluded state criminal proceedings, petitioners have no right of access to visit them. Thus, petitioners' alleged "contacts" with the monkeys are too ephemeral and transitory to provide them with standing. Accord, *Animal Lovers Volunteer Ass'n* v. *Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985) (environmental group lacked standing to challenge treat-

ment of animals in federal enclave to which there was no public access).[5]

In any event, petitioners seem to accept (Pet. 57, 60) the legal proposition that a high degree of regular personal contact between the property sought to be protected and the person attempting to sue is necessary to confer standing. The question whether the quantum of personal contact involved here was sufficient to confer standing is essentially a factual question unworthy of this Court's review.

c. Petitioners next argue (Pet. 62-63) that NIH has greater "remedial rights or authority" to protect the monkeys than it exercised in this case. But there is no question here concerning the standing of NIH to exercise any rights that it may have. Rather, the question concerns the right of petitioners to invoke the jurisdiction of a federal court to exercise *their* alleged rights. Petitioners' argument is thus beside the point.

d. Finally, petitioners err in claiming (Pet. 63-64) that the application of the Federal Magistrate Act of 1979 in this case conflicts with that statute's

---

[5] The cases that petitioners cite (Pet. 59-60) do not hold to the contrary. In *Benton Franklin Riverfront Trailway & Bridge Committee* v. *Lewis*, 701 F.2d 784 (9th Cir. 1983), the plaintiffs had a right of access to and had visited the public bridge that was about to be demolished. In *Animal Welfare Institute* v. *Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), cert. denied, 434 U.S. 1013 (1978), the plaintiffs had access to and had visited the seals that they sought to save. And in *Pacific Legal Foundation* v. *Goyan*, 664 F.2d 1221 (4th Cir. 1981), the plaintiffs were held to have a financial interest in the subsidies provided to competing interest groups. Thus, none of the cases are similar to the situation here, where litigants without a right of access are attempting to base standing on their general aesthetic interest in the property in issue.

application in *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). In *Pacemaker*, the Ninth Circuit held that 28 U.S.C. 636(c), the provision permitting consensual referral to magistrates, is constitutional. See 725 F.2d at 546. Here, the case was referred to a magistrate under 28 U.S.C. 636(b), the statute's mandatory referral provision. Since the *Pacemaker* court and the court below both *upheld* referrals to magistrates, and since the *Pacemaker* decision in any event involved a different statutory provision, there is plainly no conflict between the two decisions. The *Pacemaker* court did note in dicta that 28 U.S.C. 636(b) is constitutional because it provides for a "*de novo* determination" by the district court. See 725 F.2d at 546. But that notation is completely consistent with the disposition of the district court here, where the case was dismissed only after the court conducted a "*de novo* review of the Magistrate's Report and Recommendation" (Pet. App. 59-60).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1987

---

[6] Petitioners' argument (Pet. 64) that the district court's conduct of "'*de novo* review'" conflicts with *Pacemaker*'s requirement that the district court make a "*de novo* 'determination'" is frivolous. Those terms are interchangeable. See *Pacemaker*, 725 F.2d at 546; *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985), slip op. 13-14.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40258